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Attorneys for Plaintiffs and the putative class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ERIC BOTCHER, and SAMUEL D.
GALIZIA, individually and on behalf of all
others similarly situated

Plaintiffs,

v.

MAKE SCHOOL PBC f/k/a MAKE
SCHOOL INC., MAKE SCHOOL ABC,
LLC, MAKE SCHOOL ISA SPV, LLC,
VEMO EDUCATION, INC., and DOES 1
through 10,

Defendants.

Case No. CGC-21-592710

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ATTORNEYS' FEES
AND COSTS AND FOR INCENTIVE
AWARDS**

Hearing
Date: March 22, 2024
Time: 9:00 a.m.
Dep't: 304
Judge: Hon. Ethan P. Schulman

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
11/07/2023
Clerk of the Court
BY: VERA MU
Deputy Clerk


1 **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS:**

2 **PLEASE TAKE NOTICE** that on March 22, 2024 at 9:00 a.m., or as soon thereafter as
3 the matter can be heard, in Department 304 of the San Francisco Superior Court, located at 400
4 McAllister Street, San Francisco, California 94102, Plaintiffs will and hereby do move for an
5 Order, as part of the request for final approval of the proposed class action settlement of this
6 matter, by which the Court would approve a reasonable payment from Defendants to Class
7 Counsel the sum of \$448,920.25, in the aggregate, for attorneys' fees and costs, and also an
8 incentive award of \$5,000 to each of the two Class Representatives (\$10,000 for both Class
9 Representatives).

10 This motion for attorneys' fees and costs and for incentive awards is brought under,
11 without limitation, Rule 3.769 of the California Rules of Court and is based upon this Notice of
12 Motion, the supporting Memorandum of Points and Authorities, the supporting Declarations of
13 Class Counsel (Melody L. Sequoia and William E. Kennedy), the papers and records in this
14 action, and upon such further and additional papers and argument as may be presented at or
15 before the hearing on this motion.

16 Dated: November 7, 2023

17 **THE SEQUOIA LAW FIRM**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND RELIEF REQUESTED**

3 By this motion, Plaintiffs respectfully request that the Court approve as reasonable, and
4 order Defendants to pay Class Counsel the sum of \$448,920.25 in combined attorneys' fees and
5 costs pursuant to section V.A of the Amended Settlement Agreement, as part of the final
6 approval of the proposed class action settlement in this matter. Plaintiffs further request that the
7 Court award each of the two Class Representative an incentive award in the amount of \$5,000
8 for the significant time and effort they have invested in this case on behalf of the Class, for a
9 total award of \$458,920.25.

10 The negotiated attorneys' fees, costs, and incentive awards, (collectively, the "Fee
11 Award") reflect an arms-length negotiation. The agreed-upon attorneys' fees were calculated
12 using a lodestar calculation, and both the time spent and the hourly rates charged by Class
13 Counsel are reasonable, as set forth below and in the declarations of Melody L. Sequoia and
14 William E. Kennedy. If the parties had not been able to reach agreement on the Fee Award,
15 Plaintiffs likely would have been entitled to a multiplier in a contested fee petition, which would
16 have resulted in attorneys' fees well in excess of the negotiated attorneys' fees. The attorneys'
17 fees are also reasonable in light of the exceptional benefits obtained for the Class. When
18 attorneys' fees are compared to the significant debt relief provided to Class Members, the
19 attorneys' fees are less than 2% of the relief obtained. There was no collusion between counsel
20 for the parties regarding the amount of the proposed fees and costs, and the parties negotiated
21 attorneys' fees and costs only after the substantive relief for the class had already been fully
22 negotiated. Plaintiffs therefore respectfully request that the Court grant this motion.

23 **II. PROCEDURAL AND FACTUAL HISTORY**

24
25 This proceeding was originally brought in June of 2021 as a multi-plaintiff lawsuit
26 against a now-defunct coding school in San Francisco. Among other things, Plaintiffs allege that
27

1 Defendants Make School PBC, f/k/a Make School, Inc. (“Make School”) and Vemo Education,
2 Inc. (“Vemo”) made material misrepresentations concerning so-called “income share
3 agreements,” or ISAs, which require students to share up to 25% of their pre-tax income
4 following their withdraw or graduation from the school once the student becomes employed in a
5 job that makes over a certain amount each year. (Third Amended Complaint (“TAC”) ¶¶ 2-52.)
6 At the time the lawsuit was filed, some Plaintiffs had income share obligations that exceeded
7 \$3,000 per month (more than their monthly rent or mortgage) in exchange for a mere 12-24
8 months, or less, of what Plaintiffs believed was a sub-par education. (*Id.* ¶¶ 45, 66-72.)
9 Moreover, Make School for years operated as an unaccredited institution without approval to
10 operate in the state of California pursuant to Education Code § 94886. (*Id.* ¶¶ 73-89.) As such,
11 Plaintiffs allege that any such agreement entered into while the school did not have approval to
12 operate is void and unenforceable pursuant to Education Code § 94917. (*Id.*)

13 Following notice of the dispute, Make School made an assignment for the benefit of its
14 creditors to Make School ABC, LLC (“Make School ABC”). (8/1/23 Decl. of Nate McOmber at
15 ¶¶ 2-3). Shortly thereafter, Make School stopped its ISA program and shut down. (TAC ¶ 95.)
16 Defendant Vemo, the original servicer of Make School’s ISAs, has stopped its ISA servicing
17 business and a new servicer, non-party Launch Servicing, Inc. (the “Servicer”), has taken over
18 servicing of Make School’s ISAs. (7/28/23 Decl. of Brian Dubin ¶ 3; 7/28/23 Decl. of Peter
19 Sadowski ¶¶ 1-2.) Make School’s ISAs are held by either Make School ABC (the assignee) or
20 Defendant Make School ISA, SPV. (TAC ¶¶ 10-11; 8/1/23 Decl. of Nate McOmber ¶ 15).

21 Plaintiffs, Defendants, and third-party creditors of Make School have worked exceedingly
22 hard for over two years to resolve this dispute without incurring the risk and expense of litigation.
23 Among other things, counsel for Plaintiffs subpoenaed Dominican University of California
24 (“Dominican”) seeking records relating to the partnership, known as an “incubation relationship,”
25 between Dominican and Make School. (Sequoia Decl. ¶ 16.) In addition Plaintiffs issued a Public
26 Records Act Request to the BPPE seeking records relating to Make School’s BPPE approval status,
27

1 its applications for BPPE approval, and citations issued to Make School, among other things.
2 (*Id.* ¶ 17.) The parties further exchanged extensive data on Make School’s ISA portfolio.
3 (*Id.* ¶ 18).

4 In May of 2022, after months of negotiation and the exchange of documents and
5 information, the parties spent a full day in mediation with an experienced mediator, Barbara
6 Reeves. (*Id.* ¶ 20.) Ms. Reeves was fully apprised of the arguments and facts of this case by means
7 of extensive briefing and factual presentations by the parties, as well as a third-party creditor of
8 Make School present at the mediation. (*Id.*; *see also* 7/28/23 Pearson Decl. ¶ 2.)

9 At the mediation, the parties reached a tentative agreement to resolve the case between the
10 parties on a class basis, affecting approximately 266 students who have approximately 679 active
11 ISAs with Make School. (Sequoia Decl. ¶ 21.) Among other things, the parties agreed that all
12 ISAs entered into to pay for tuition that were signed prior to Make School first obtaining BPPE
13 approval would be voided. (Am. Settlement (Ex. 1 to 7/28/23 Sequoia Decl.) at § IV.A.1.) For
14 all other ISAs (*i.e.*, ISAs entered into to pay living expenses and ISAs for tuition signed after Make
15 School first obtained BPPE approval), the parties agreed to restructure them into a significantly
16 reduced zero interest payment plan, with no payments owed if the student does not make over a
17 certain amount each year. (*Id.* at § IV.A.2-A.5.) The parties further agreed to provide additional
18 relief for individuals entitled to Post-9/11 GI Bill benefits. (*Id.* § IV.A.6.)

19 Over the course of several more months, the parties and creditors of Make School
20 continued to negotiate the terms of a class settlement, and the parties eventually memorialized
21 their tentative agreement into a class settlement that was submitted to the Court for preliminary
22 approval on April 28, 2023. (*See* Mot. for Prelim. Approval and supporting declarations.) On
23 June 30, 2023, the Court issued an Order requesting that the parties provide a supplemental filing
24 and supporting declarations to clarify certain issues and answer questions raised in that Order.
25 (6/30/23 Order.) In response to the June 30 Order, the parties entered into an Amended
26 Settlement Agreement dated July 28, 2023. (7/28/23 Sequoia Decl. at Ex. 1.) The Court held a
27

1 hearing on the Motion for Preliminary Approval on August 15, 2023. At that hearing, the Court
2 indicated that it would grant preliminary approval if certain specified changes were made to the
3 Amended Settlement Agreement, and if the Parties confirmed certain matters to the Court in a
4 second supplemental filing. (9/5/23 Sequoia Decl. at ¶ 4.) The items needing further
5 clarification or agreement by the parties are set forth in the Court’s August 15, 2023 order.
6 (8/15/23 Order.) Per the Court’s instruction, the parties conferred and executed an Amendment
7 to the Amended Settlement Agreement on September 5, 2023. (9/5/23 Sequoia Decl. Ex. 1.) The
8 Amendment to the Amended Settlement Agreement amends sections VI.A and VI.B of the July
9 28 Settlement Agreement, the proposed form of class notice, and the proposed order granting
10 preliminary approval. (9/5/23 Sequoia Decl. at Ex. 1.)

11 On September 7, 2023, the Court entered a Preliminary Approval Order which
12 preliminarily approved the proposed class action settlement in this matter. (9/7/23 Order.) Among
13 other things, the Court directed that Plaintiffs’ counsel submit their fee petition in this matter on
14 or before October 20, 2023. (*Id.* at ¶ 13.) On October 16, 2023, the parties entered into a joint
15 stipulation (which the court approved) to extend the class notice deadlines. Pursuant to the Court’s
16 October 16, 2023 order, Plaintiffs are required to submit their fee petition on or before November
17 7, 2023. (10/16/23 Order).

18
19 **III. THE COURT SHOULD APPROVE THE STIPULATED AMOUNT OF FEES
AND COSTS**

20 The parties’ agreed-on fees and costs are presumed to be reasonable because they reflect
21 an arms-length compromise. *See, e.g., Wehlage v. Evergreen at Arvin LLC*, No. 4:10-CV-
22 05839-CW, 2012 WL 4755371, at *1 (N.D. Cal. 2012) (“[T]he agreed amounts for attorneys’
23 fees and expenses . . . are presumed to be reasonable.”). As set forth below and in the supporting
24 declarations, the Fee Award is reasonable under the lodestar method. Moreover, when the
25 attorneys’ fees incurred by Class Counsel are compared to the significant relief provided to the
26 Class—here, over \$27.5 million in debt relief—the requested fee of less than 2% of that relief
27

1 obtained is appropriate in this case. Finally, the requested fee is reasonable and appropriate based
2 on the risks of litigation, its complexity, and the nature and risk of non-payment due to the
3 contingent nature of Class Counsel’s fee arrangement with the Plaintiffs. (Sequoia Decl. ¶ 35.)

4 **A. The requested attorneys’ fees are reasonable.**

5 1. The parties calculated the Fee Award using the lodestar method.

6 The agreed-on attorneys’ fees were calculated using the lodestar method. Counsel used
7 the lodestar method in calculating the Fee Award because in fee shifting cases like this one, in
8 which the responsibility to pay attorneys’ fees is statutorily or otherwise transferred from the
9 prevailing plaintiff or class to the defendant, the primary method of establishing the amount of
10 “reasonable” attorney fees is the lodestar method. Pearl, *California Attorney Fee Awards* (2d
11 ed.1998) §§ 13.1–13.7; *Syers Properties III, Inc. v. Rankin*, 226 Cal. App. 4th 691, 698 (2014)
12 (noting that the California Supreme Court opinion in *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001)
13 “reaffirmed the primacy of the lodestar method for all fee-shifting statutes.”)

14 Here, the lodestar method is appropriate because Plaintiffs’ claims were brought under
15 fee shifting statutes. See TAC ¶ 6 and pgs. 39-41 (requesting attorneys’ fees pursuant to CA
16 Civil Code § 1788.103(b) and CA Code of Civil Procedure § 1021.5). Moreover, although the
17 settlement is significant in its monetary consequences to the Class, it has not led to a fund from
18 which fees can be paid, making a lodestar calculation most appropriate compared to a common
19 fund calculation. See *Serrano v. Priest*, 20 Cal. 3d 25, 37-38 (1977) (“[W]here plaintiffs’ efforts
20 have not . . . create[ed] or preserv[ed] . . . an identifiable ‘fund’ of money out of which they seek
21 to recover their attorneys fees, the common fund exception is inapplicable.”); see also *Nw.*
22 *Energetic Servs., LLC v. California Franchise Tax Bd.*, 159 Cal. App. 4th 841, 878 (2008)
23 (plaintiff could not recover attorneys’ fees under the common fund doctrine where litigation did
24 not result in creation or preservation of a fund from which to pay attorneys’ fees).

25 The lodestar approach “anchors the [court’s] analysis to an objective determination of the
26 value of the attorney’s services, ensuring that the amount awarded is not arbitrary.” *PLCM Grp.*

1 v. *Drexler*, 22 Cal. 4th 1084, 1095 (2000). Under the “lodestar” method, attorneys’ fees are
 2 determined by multiplying the number of hours reasonably expended by the reasonable hourly
 3 rate for those services. *Id.* The reasonable hourly rate is the rate prevailing in the community for
 4 similar work. *Id.* The lodestar amount may then be adjusted, based on factors specific to the
 5 case, in order to fix the fee at the fair market value for the legal services provided. *Id.*

6 2. The lodestar calculation is reasonable.

7 As set forth in their supporting declarations, Class Counsel are fully competent and
 8 capable. As of the filing of this Fee Motion, Class Counsel have expended 982.5 hours and
 9 \$7,715.25 in costs in prosecuting this case over the course of over two years. (Sequoia Decl. ¶¶
 10 31-32 and Ex. A and B; Kennedy Decl. ¶ 9). These figures do *not* include time Class Counsel
 11 will incur between the filing of this Fee Motion and final approval. Among other things, Class
 12 Counsel anticipates spending additional time preparing the motion for final approval, appearing
 13 at the final approval hearing, communicating with class members, and assisting as needed with
 14 resolving any disputes that may arise with respect to the amount owed pursuant to any New
 15 Agreement. (Sequoia Decl. ¶ 33; Kennedy Decl. ¶ 10.) Melody Sequoia estimates she will
 16 spend an additional 25 hours on these tasks (\$11,875), and William Kennedy estimates he will
 17 spend an additional 10 hours on these tasks (\$6,000). *Id.* For the convenience of the Court, Class
 18 Counsel’s lodestar calculation (including estimated time between this Motion and final
 19 approval), is summarized below:

Name	Rate	Total Hours (including anticipated time between now and final approval)	Lodestar Amount
William E. Kennedy	\$600	88.9	\$53,340
Melody L. Sequoia	\$475	751.2	\$356,820
Hannah Odekirk	\$175	177.4	\$31,045
Total Lodestar			\$441,205
Total Costs			\$7,715.25
Total Lodestar + Costs			\$448,920.25

1
2 (Sequoia Decl. at Ex. A, B and ¶¶ 31-34; Kennedy Decl. at ¶¶ 9-10.) The declarations provide a
3 categorical breakout of time expended by each attorney and law clerk that tracks the chronology
4 of the case. See *Syers III*, 226 Cal. App. 4th at 700 (quoting *In re HPL Technologies*, 266 F.
5 Supp. 2d 912, 920 (N.D. Cal. 2005)) (noting that a categorical breakout of time expended is an
6 “especially helpful compromise between reporting hours in the aggregate (which is easy to
7 review but lacks informative detail) and generating a complete line-by-line billing report (which
8 offers great detail, but tends to obscure the forest through the trees.”)¹ The categories of time
9 expended by Ms. Sequoia are reflected in Exhibit A to her declaration and include the
10 following:²

11 **(1) Pre-filing Investigation.** Plaintiffs’ counsel engaged in an extensive pre-filing
12 investigation. (Sequoia Decl. ¶¶ 8-14.) Plaintiffs’ counsel analyzed each individual Plaintiff’s
13 income share agreement, enrollment agreement, and other documents related to the claims.
14 (*Id.* ¶ 9.) Counsel conducted extensive research into potential claims and defenses in this matter,
15 including but certainly not limited to novel issues relating to whether Make School’s income
16 share agreements are “loans” or “credit” under relevant law. (*Id.* ¶ 11.) Counsel reviewed
17 evidence relating to Plaintiffs’ claims, including searching internet archives for advertising and
18 other messaging that was provided to former Make School students. (*Id.* ¶ 10.) Counsel
19 submitted complaints to various regulatory agencies and has continued to cooperate with those
20 agencies in their investigation throughout the pendency of this litigation. (*Id.* ¶ 12.)
21 Investigation and factual research continued throughout the lawsuit, as both Make School and
22 Vemo ceased its operations, third party discovery was obtained, and as additional factual issues
23
24

25 ¹ Plaintiffs are of course willing to provide a line-by-line billing report should the Court request
26 it.

27 ² William E. Kennedy has likewise provided a categorical breakdown of his time spent in this
28 matter. Kennedy Decl. ¶¶ 4-9.

1 arose leading up to and after mediation. (*Id.* ¶ 14.) In total, as reflected in Exhibit A to Ms.
2 Sequoia’s declaration, 89.2 hours were spent on investigation and factual research.

3 **(2) Client meetings and communications.** Because this case was originally brought as
4 an individual action with over 50 individual Plaintiffs, counsel incurred substantial time
5 interviewing and corresponding with Plaintiffs, both in the outset of the litigation and throughout
6 the pendency of this case as counsel continued to investigate Plaintiffs’ claims and consult with
7 the individual Plaintiffs at multiple points concerning settlement. (*Id.* ¶ 8.) A total of 179 hours
8 was spent meeting and corresponding with the individual Plaintiffs.

9 **(3) Discovery.** Time spent on discovery efforts in this case included, among other things,
10 issuing a subpoena to Dominican University (the WSCUC-accredited educational program that
11 entered into an “incubation” relationship with Make School), obtaining a protective order,
12 meeting and conferring with counsel for Dominican, and reviewing documents produced in
13 response to that subpoena. (*Id.* ¶ 16.) In addition, Plaintiffs’ counsel issued a Public Records
14 Act request to the BPPE, which yielded voluminous relevant documents that were analyzed.
15 (*Id.* ¶ 17.) Finally, significant time was dedicated to reviewing information that was exchanged
16 informally between the parties as part of their settlement efforts. Among other things,
17 Defendants provided detailed spreadsheets identifying, for each ISA, the holder of the ISA, the
18 date the ISA was funded, the amount borrowed, the payment cap, the amount of money paid on
19 the ISA to date, and the type of ISA (stipend or tuition ISA). (*Id.* ¶ 18.) In total, 55.4 hours were
20 spent on discovery efforts.

21 **(4) Pleadings, briefs, and pre-trial motions and stipulations.** As reflected in Exhibit A
22 to Mrs. Sequoia’s declaration, a total of 81.5 hours was spent drafting pleadings (including the
23 original, first, second, and third amended complaints, and performing associated legal research),
24 pre-trial motions (including an application for complex designation), and numerous joint status
25 reports and stipulations. (*Id.* at ¶ 29 and Ex. A.)
26
27
28

1 **(5) Court Appearances.** A total of 7.6 hours was spent preparing for and attending court
2 hearings, both in person and by Zoom. (*Id.*)

3 **(6) Participation in claims process for Make School ABC.** After the individual
4 Plaintiffs submitted a demand letter and had engaged in preliminary pre-filing settlement
5 discussions, Make School informed Plaintiffs that “due to the threatened lawsuit and other
6 factors,” Make School would be entering into an assignment for the benefit of the creditors,
7 triggering a claims process similar to a bankruptcy proceeding that required each of the 55
8 individual Plaintiffs to submit a claim to the assignee, defendant Make School ABC. (*Id.* ¶ 13.)
9 That claims process required 43.4 hours of attorney and law clerk time. (*Id.* at Ex. A.)

10 **(7) Settlement efforts.** Settlement negotiations in this case were extensive, resulting in
11 231.9 hours of time expended. (*Id.* ¶¶ 19-23 and Ex. A.) For almost four months beginning in
12 September of 2021, the parties attempted to settle the matter before agreeing to a full-day
13 mediation in May of 2022. (*Id.* ¶¶ 19-20.) The parties drafted detailed mediation memoranda
14 (and performed additional legal research), which resulted in significant attorney and law clerk
15 time. (*Id.* ¶ 20.) Following the mediation, Plaintiffs’ counsel continued to devote significant time
16 to negotiating and drafting the remaining terms of the settlement, which required a complex
17 untangling of Make School’s loan portfolio and its relationship to its secured creditors, among
18 other things. (*Id.* ¶¶ 21-22).

19 **(8) Litigation strategy and analysis.** A total of 34.2 hours was spent developing
20 litigation strategy. (*Id.* at Ex. A.)

21 **(9) Participation in regulatory investigations relating to litigation.** On behalf of the
22 individual Plaintiffs, counsel submitted complaints to various regulatory agencies, such as the
23 BPPE and the Department of Financial Protection and Innovation (the “DFPI”) and counsel has
24 cooperated with those agencies in their investigation throughout the pendency of this litigation.
25 (*Id.* at ¶ 12.) A total of 41.5 hours was spent on these tasks. (*Id.* at Ex. A.)

1 **(10) Case management and administration.** A total of 19.8 hours was spent on case
2 management and administration. (*Id.*) Class Counsel did not bill for purely administrative tasks
3 such as time spent photocopying, printing, and downloading files. (*Id.* at ¶ 26; *see also* Kennedy
4 Decl. ¶ 11.)

5 **(11) Class action approval and settlement administration.** A total of 120.1 hours was
6 spent seeking approval of the class action settlement reached by the parties on April 28, 2023.
7 (Sequoia Decl. Ex. A.) Among other things, Plaintiffs drafted and filed a motion for preliminary
8 approval of class action settlement, filed a supplemental filing (and supporting declarations) on
9 July 28, 2023, and a second supplemental filing (and supporting declarations) on September 5,
10 2023. Since obtaining approval, counsel has spent time working closely with the settlement
11 administrator to oversee administration and ensure that the administrator has the documents and
12 information it needs to provide class notice. (*Id.* ¶ 29 and Ex. A.)

13 The time spent on all of these activities is reasonable in light of all that was required to
14 obtain relief for the Class. Class Counsel kept contemporaneous time records for their work on
15 the case. (*Id.* ¶ 26.) Counsel did not bill for purely administrative tasks, and exercised judgment
16 in existing some hours that they believed exceeded the time required for the task. (*Id.* ¶ 26.)

17 Under the lodestar approach, the number of hours expended is multiplied by counsels’
18 reasonable hourly rate. *Drexler*, 22 Cal. 4th at 1095. Melody Sequoia’s and William Kennedy’s
19 hourly rates (\$475 and \$600 per hour, respectively), are consistent with, if not lower than, the
20 rates charged by comparable attorneys in the San Francisco Bay Area for similar work. Sequoia
21 Decl. ¶ 27; Kennedy Decl. ¶¶ 13-14; *see also See In re LinkedIn User Privacy Litigation*, 309
22 F.R.D. 573, 591-92 (N.D. Cal. 2015) (“In the Bay Area, ‘reasonable hourly rates for partners
23 range from \$560 to \$800, for associates from \$285 to \$510, and for paralegals and litigation
24 support staff from \$150 to \$240.’”) (internal quotation omitted). Class Counsel’s hourly rates
25 are consistent with the current Laffey Matrix rates for attorneys with the same level of
26 experience. *See* <http://www.laffeymatrix.com/see.html> (listing 2023 rates of \$1,057 for attorneys
27

1 over 20 years out of law school, \$777 for attorneys 8-10 years out of law school, and \$538 for
2 attorneys 4-7 years out of law school).

3 The reasonableness of the requested award of fees and costs is highlighted by the fact that
4 Class Counsel would possibly be entitled to a multiplier of the raw lodestar in this case, which
5 would result in a fee award well in excess of the requested Fee Award. *See Drexler*, 22 Cal. 4th
6 at 1095 (“The lodestar figure may then be adjusted based on consideration of factors specific to
7 the case, in order to fix the fee at the fair market value for the legal services provided.”) These
8 factors include “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in
9 presenting them, (3) the extent to which the nature of the litigation precluded other employment
10 by the attorneys, [and] (4) the contingent nature of the fee award.” *Ketchum*, 24 Cal. 4th at 1132.

11 All of these factors are present in this case. As described in detail in the Motion for
12 Preliminary Approval, the issues in this case are difficult, complex, and novel, requiring
13 significant work. At the time Plaintiffs filed this lawsuit, no court had decided the issue of
14 whether income share agreements are “loans” or “credit.”³ Moreover, due to Make School’s
15 closure, the ISAs that are the subject of this litigation are held by different entities than those that
16 engaged in the unlawful, unfair, and fraudulent conduct in connection with the marketing of the
17 ISAs. This created complex issues surrounding the holder rule as a basis assert claims based on
18 that conduct against subsequent holders of the ISAs.

19 Plaintiffs respectfully submit that they displayed skill in presenting their claims, as
20 demonstrated in the Third Amended Complaint and their diligent investigation of the case. Class
21 Counsel are solo practitioners, and the representation provided by Class Counsel was entirely
22 contingent. (Sequoia Decl. ¶ 35). The Plaintiffs were not charged any fees whatsoever during
23 more than two years of litigation and counsel advanced all costs. *Id.* The nature of this litigation
24 precluded other employment by Melody Sequoia. *Id.* Class Counsel worked exceedingly hard

25 ³ After the lawsuit was filed, two regulators issued orders in which they recognized income share
26 agreements as student loans for purposes of the Student Loan Servicing Act and the Consumer Financial
27 Protection Act. (*See TAC* ¶ 27.) While Plaintiffs disagree, Defendants contend that these consent orders
28 are only binding on the parties to them, and they do not retroactively affect Make School’s ISAs.

1 on this case and, if the parties had not been able to reach agreement on the Fee Award, Plaintiffs
2 would have had a strong argument that they are entitled to a multiplier in a contested fee petition
3 between two to four times the raw, unadjusted lodestar. *See Wershba v. Apple Computer, Inc.*,
4 91 Cal. App. 4th 224, 229 (2001) (“Multipliers can range from 2 to 4 or even higher.”); *Otero v.*
5 *Rent-A-Center, Inc.*, (L.A. Super. Ct. 2000) No. BC217038 (awarding 2.43 multiplier); *Vizcaino*
6 *v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (applying a 3.65 multiplier to the
7 lodestar amount). Applying a modest multiplier of 2 in this case would have resulted in attorney
8 fees of over \$880,000—a number that is significantly higher than the agreed-on Fee Award in
9 the Settlement, further underscoring the reasonableness of the fees requested.

10
11 **B. Separately, the Fee Award is reasonable when compared to the value of
the relief obtained for the class.**

12 The negotiated fees and costs are reasonable in light of the exceptional benefits obtained
13 for the Class. A “cross-check” of the lodestar calculation based on percentage of the recovery
14 “helps to determine a reasonable fee because a percentage-of-the-benefit analysis provides a
15 credible measure of the market value of the legal services provided.” *Laffitte v. Robert Half*
16 *Int. ’l Inc.*, 1 Cal. 5th 480, 502 (2016).

17 While the Settlement does not result in direct payments to Class Members, the
18 restructuring of the ISAs and cancellation of certain ISAs provides a valuable award to Class
19 Members that should be considered when determining the total value of the Settlement. *See*
20 *Smith v. CRST Van Expedited, Inc.*, 10-CV-1116-IEG WMC, 2013 WL 163293 (S.D. Cal., Jan
21 14, 2013) (including \$9 million in debt relief in measuring the total value of settlement for
22 purposes of calculating class counsel’s fee award); *Bottoni v. Sallie Mae, Inc.*, No. C. 10-03602
23 LB, 2013 WL 12312794, at *7 (N.D. Cal. Nov. 21, 2013) (awarding \$1.2 million in attorneys’
24 fees in connection with class settlement providing substantial debt relief).

25 As set forth in Plaintiffs’ Motion for Preliminary Approval and supplemental filings, the
26 settlement confers substantial and immediate benefits to the Class. Prior to this lawsuit, former
27

1 been fully negotiated. (Sequoia Decl. ¶ 23.) The parties did not negotiate a fee for Class Counsel
2 at the mediation or at any time prior. (*Id.*) In the months that followed the mediation, the parties’
3 negotiated issues relating to settlement administration, tax treatment, and class notice, among
4 other things. (*Id.*) It was not until the material terms agreed to at the mediation (along with
5 additional terms relating to settlement administration and class notice) had been memorialized in
6 what would become the written settlement that the parties negotiated a fee amount. (*Id.*; 7/28/23
7 Pearson Decl. ¶ 2.)

8 Moreover, if approved, the attorneys’ fees will not come out of the relief obtained for the
9 Class. Instead, it will be paid separately by Defendants. Accordingly, awarding the fees and
10 costs will not reduce the Class relief in any way. On the other hand, not approving the agreed-on
11 fees will serve no other purpose than to give the Defendants a windfall by giving them monies
12 that the Defendants have already agreed to pay as fees and costs.

13 **IV. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS** 14 **REPRESENTATIVES ARE REASONABLE**

15 Class Representatives Eric Botcher and Olivia Galizia each seek incentive awards in the
16 amount of \$5,000 (\$10,000 total). This amount is appropriate compensation for their time and
17 effort serving as class representatives in this litigation.

18 Service awards are discretionary and are intended to “compensate class representatives
19 for work done on behalf of the class, to make up for financial or reputational risk undertaken in
20 brining the action, and, sometimes, to recognize their willingness to act as a private attorney
21 general.” *Rodriguez v. W. Publ’g Corp.*, 563 F. 3d 948, 958 (9th Cir. 2009); *In re Mego Fin.*
22 *Corp. Sec. Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (affirming \$5,000 incentive award).

23 Both Class Representatives filed declarations in support of the Motion for Preliminary Approval
24 on April 28, 2023 detailing their involvement in this case over the course of the past two years.
25 As set forth in those declarations, the Class Representatives assisted with the preparation of the
26 complaint and discovery in this case by providing facts and documents, and by reviewing the
27


1 draft demand letter and complaint before this lawsuit was filed. Both Class Representative were
2 also present at the all-day mediation session in May of 2022, and reviewed and edited the
3 Settlement Agreement, including the exhibits thereto. Plaintiffs' involvement in this action was
4 significant, and they helped achieve substantial relief that will benefit over 250 former Make
5 School students. Accordingly, a \$5,000 incentive award for each Plaintiff is fair and reasonable.

6 **V. CONCLUSION**

7 For the reasons stated, Plaintiffs respectfully request that the Court approve and Order
8 Defendants to pay Class Counsel \$448,920.25 in attorneys' fees and costs, and pay each Class
9 Representative a \$5,000 incentive award, for a total award of \$458,920.25.

10
11
12 Dated: November 7, 2023

THE SEQUOIA LAW FIRM

13
14 By: 
15 Melody L. Sequoia, Esq. (SBN: 309163)
16 Email: melody@sequoialawfirm.com
17 **THE SEQUOIA LAW FIRM**
18 3000 El Camino Real, Suite 4-200
19 Palo Alto, California 94306
20 Office: (650) 561-4791
21 *Attorney for Plaintiffs and the putative class*

22 William Kennedy (SBN: 158214)
23 Email: wkennedy@kennedyconsumerlaw.com
24 **Consumer Law Office of William E. Kennedy**
25 2797 Park Ave., Suite 203
26 Santa Clara, CA 95050-1500
27 Office: (408) 241-1000
28 *Attorney for the putative class*

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is 3000 El Camino Real, Suite 4-200, Palo Alto, CA 94306

On the date written below, I served the following document(s): **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS AND FOR INCENTIVE AWARDS**

- (By U.S. Mail)** By placing the document(s) listed above in a sealed envelope with Postage thereon fully prepaid, in the United States Mail in Menlo Park, California, addressed as set forth below.
- (Electronic Service)** By electronically serving a true copy thereof to the e-mail address(es) listed in accordance with Code of Civil Procedure 1010.6(b), California Rules of Court, Rules 2.253(b).
- (File & ServeXpress)** I electronically filed and served the above document(s) utilizing File & ServeXpress on November 7, 2023. Counsel of records are required by the Court to be registered to electronically file and serve on this case and are designated accordingly on the Transaction Receipt located on the File & ServeXpress website.
- (By Personal Service)** By personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

PARTIES SERVED:

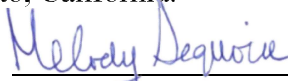
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(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct to the best of my knowledge.

Executed on November 7, 2023 at Palo Alto, California.



 Melody L. Sequoia

1 Melody L. Sequoia, Esq. (SBN: 309163)
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13 *Attorneys for Plaintiffs and the putative class*

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN FRANCISCO**

16 ERIC BOTCHER, and SAMUEL D.
17 GALIZIA, individually and on behalf of all
18 others similarly situated

19 Plaintiffs,

20 v.

21 MAKE SCHOOL PBC f/k/a MAKE
22 SCHOOL INC., MAKE SCHOOL ABC,
23 LLC, MAKE SCHOOL ISA SPV, LLC,
24 VEMO EDUCATION, INC., and DOES 1
25 through 10,

26 Defendants.

Case No. CGC-21-592710

**DECLARATION OF MELODY L.
SEQUOIA, ESQ. IN SUPPORT OF
MOTION FOR ATTORNEYS' FEES
AND COSTS AND INCENTIVE AWARDS**

Hearing

Date: March 22, 2024

Time: 9:00 a.m.

Dep't: 304

Judge: Hon. Ethan P. Schulman

ELECTRONICALLY
FILED

Superior Court of California,
County of San Francisco

11/07/2023
Clerk of the Court

BY: VERA MU

Deputy Clerk

1 I, MELODY L. SEQUOIA, declare as follows:

2 1. I have personal knowledge of the facts set forth herein, and if called to testify
3 thereto, I could and would do so competently.

4 2. I am an attorney in good standing with the State Bar of California and Illinois. I
5 am the founder and owner of The Sequoia Law Firm, counsel of record for Plaintiffs in this
6 action. I submit this declaration in support of Plaintiffs' Motion for Attorneys' Fees and Costs in
7 this matter ("Fee Motion").

8 3. In its order preliminarily approving the class action settlement in this matter, the
9 Court preliminarily appointed me and my co-counsel, William E. Kennedy, as counsel for the
10 Settlement Class ("Class Counsel"), finding that Class Counsel is capable of exercising all
11 responsibilities as Class Counsel.

12 4. I have been practicing law for almost nine years. I graduated *magna cum laude*
13 from Chicago-Kent College of Law in 2015. Following law school, I worked as a litigation
14 associate at Chapman Spingola, LLP and Tabet, DiVito & Rothsetin, LLC in Chicago, Illinois. I
15 have successfully represented clients in both state and federal courts, including in class action
16 matters, and have experience in all phases of litigation, from initial case investigation to appeals.
17 I have been selected as a "rising star" in Northern California (2020-2023) and Illinois (2019-
18 2020) by *Super Lawyers Magazine*, a distinction given to no more than 2.5% of attorneys in the
19 state.

20 5. In 2019, I founded The Sequoia Law Firm and I have devoted my practice to
21 plaintiff-side consumer protection litigation matters, including class action, multi-plaintiff, and
22 other complex litigation matters.

23 6. Since founding The Sequoia Law Firm, my practice has concentrated in
24 prosecuting cases arising under the California Unfair Competition Law (Cal. Bus. & Prof. Code
25 § 17200), False Advertising Law (Cal. Bus. & Prof. Code § 17500), Consumer Legal Remedies
26 Act (Cal. Civ. Code § 1750), Rosenthal Fair Debt Collections Practices Act (Cal. Civ. Code §

1 1788 *et. seq.*), the California Student Loan Servicing Act (Cal. Civ. Code § 1788.101 *et. seq.*), as
2 well as other California consumer-protection laws.

3 7. I have experience prosecuting and defending class actions in both federal and
4 state court. I have been involved in the following class action lawsuits: *Jessica Day v. Geico*
5 *Casualty Co. et. al.*, Case No. 5:21-CV-02103-BLF (N.D. Cal.) (prosecution of federal class
6 action UCL claim alleging that Geico unjustly profited off the COVID-19 pandemic); *Farmers*
7 *Insurance Exchange v. Daniel De Sloover*, Case No. 21STCV32142 (LA Super. Ct.) (class
8 action cross-complaint against Farmers Insurance alleging that Farmers unjustly profited off the
9 COVID-19 pandemic); *Rosie Jones et. al. v. Village of Crestwood*, Case No. 2017-CH-13401
10 (Cook County Chancery Div. 2017) (defense of class action lawsuit against Cook County
11 village).

12 **A. Pre-filing investigation**

13 8. I have performed an extensive amount of work in the prosecution of this matter
14 over the course of over two years. The original complaint in this action was filed on June 25,
15 2021 behalf of 47 individual plaintiffs who attended Defendant Make School PBC f/k/a Make
16 School, Inc. When the complaint was amended in July of 2021, an additional eight plaintiffs
17 were added to the complaint for a total of 55 plaintiffs. Due to the fact that this case was
18 originally brought as an individual action with over 50 Plaintiffs, I incurred substantial time
19 interviewing and corresponding with Plaintiffs, both in the outset of the litigation and throughout
20 the pendency of this case as I continued to investigate Plaintiffs' claims and consult with the
21 individual Plaintiffs at multiple points concerning settlement.

22 9. Even before the lawsuit was filed, I engaged in an investigation over the course of
23 several months that included, among other things, personally interviewing each and every
24 individual plaintiff, and analyzing each individual plaintiff's income share agreement, enrollment
25 agreement, and other documents and information related to their claims.

1 10. My investigation also consisted of reviewing evidence relevant to the Plaintiffs’
2 claims. Among other things, I watched numerous recorded student information sessions related
3 to Make School’s income share agreement program. I searched internet archives for advertising
4 and other messaging that was provided to former Make School students during the relevant time
5 period.

6 11. The pre-filing investigation also included extensive research into the potential
7 claims and defenses in this matter. Among other things, I, along with a law clerk (Hannah
8 Odekirk), reviewed every published and unpublished case we could find that raised similar
9 claims and/or defenses to Plaintiffs’ claims, in both California and in the country as a whole. I
10 spoke numerous times with experts on income share agreement regulation, and predatory lending
11 in general. We conducted extensive legal research into the California Education Code, including
12 but not limited to the Education Code provisions relating to the jurisdiction of the Bureau of
13 Private Post-secondary Education (the “BPPE”) over entities like Make School that enter into so-
14 called “incubation” relationships with programs that are accredited by the WASC Senior College
15 and University Commission (“WSCUC”). We further conducted extensive research into the
16 legal status of income share agreements generally, *i.e.*, whether under current law, income share
17 agreements qualify as a “loan” or “credit.”

18 12. On behalf of the individual Plaintiffs, I submitted complaints to various regulatory
19 agencies, such as the BPPE and the California Department of Financial Protection and
20 Innovation (the “DFPI”) and I have cooperated with those agencies in their investigation
21 throughout the pendency of this litigation.

22 13. Finally, before this lawsuit was filed, Plaintiffs submitted a demand letter to
23 Defendants and engaged in pre-filing settlement discussions. Those settlement discussions came
24 to a halt when Make School notified me on June 4, 2021 that “due to the threatened lawsuit and
25 other factors,” Make School would be entering into an assignment for the benefit of the creditors,
26 triggering a claims process similar to a bankruptcy proceeding that required each of the 55
27

1 individual plaintiffs to submit a claim to the assignee, defendant Make School ABC. That claims
2 process required significant time to review and submit a claim form for each of the 55 individual
3 plaintiffs.

4 14. I continued investigation and factual research throughout the pendency of this
5 litigation, as both Make School and Vemo ceased its operations, third party discovery was
6 obtained, and as additional factual issues arose leading up to and after mediation.

7 **B. Discovery**

8 15. After the filing of this lawsuit, we continued to perform additional factual and
9 legal investigation regarding numerous issues that arose during litigation. Among other things,
10 when Make School did eventually cease operations, I, along with a law clerk, engaged in
11 significant factual and legal investigation concerning that closure. We further researched and
12 investigated new findings by various regulators (in consent orders) that income share agreements
13 are loans and/or do create debt.

14 16. Time spent on discovery efforts in this case included, among other things, issuing
15 a subpoena to Dominican University (the WSCUC-accredited educational program that entered
16 into an “incubation” relationship with Make School), obtaining a protective order, meeting and
17 conferring with counsel for Dominican University, and reviewing documents produced in
18 response to that subpoena.

19 17. In addition, Plaintiffs’ counsel issued a Public Records Act request to the BPPE,
20 which yielded voluminous relevant documents that were analyzed.

21 18. Finally, significant attorney time was dedicated to reviewing information that was
22 exchanged informally between the parties as part of their settlement efforts. Among other things,
23 Defendants provided detailed spreadsheets identifying, for each ISA, the holder of the ISA, the
24 date the ISA was funded, the amount borrowed, the payment cap, the amount of money paid on
25 the ISA to date, and the type of ISA (stipend or tuition ISA).

1 These negotiations took place over the course of many months because reaching a class-wide
2 settlement in this matter involved a complex untangling of Make School’s loan portfolio and its
3 relationship to Make School’s secured creditors.

4 23. The parties negotiated attorneys’ fees and costs after the substantive relief for the
5 class had already been fully negotiated. The parties did not negotiate a fee for Class Counsel at
6 the mediation or at any time prior. In the months that followed the mediation, the parties’
7 negotiated issues relating to settlement administration, tax treatment, and class notice, among
8 other things. It was not until the material terms agreed to at the mediation (along with additional
9 terms relating to settlement administration and class notice) had been memorialized in what
10 would become the written Settlement that the parties negotiated a fee amount.

11 24. The parties filed a motion for preliminary approval of class action settlement on
12 April 28, 2023. In connection with that motion, the Court requested, and Plaintiffs’ counsel
13 prepared, a supplemental filing (and supporting declarations) on July 28, 2023, and a second
14 supplemental filing (and supporting declarations) on September 5, 2023. Since obtaining
15 approval on September 7, 2023, I have spent time working closely with the settlement
16 administrator and defendants to oversee administration and ensure that the Administrator has the
17 documents and information it needs to provide proper notice pursuant to the parties’ settlement
18 agreement.

19 **C. Class Counsel’s Lodestar Calculation**

20 25. Class Counsel includes two individual attorneys: Melody L. Sequoia of The
21 Sequoia Law Firm, and William E. Kennedy of The Consumer Law Offices of William E.
22 Kennedy. Class Counsel has expended a substantial amount of time and effort in prosecuting
23 this action and achieving substantial benefits for the Class. The requested fee is reasonable and
24 appropriate based on the risks of litigation, its complexity, and the contingent nature and risk of
25 non-payment in this case.

Name	Hourly Rate	Hours	Lodestar Amount
William E. Kennedy	\$600	78.9	\$47,340
Melody L. Sequoia	\$475	726.2	\$344,945
Hannah Odekirk (law clerk) ¹	\$175	177.4	\$31,045

32. In addition to fees, to date Plaintiffs have incurred \$3,051.91 in filing fees and other costs, as well as \$4,663.34 in mediation fees, which is itemized in the Cost Summary attached as **Exhibit B**. As reflected in Exhibit B, total costs incurred by Plaintiffs as of November 6, 2023 (the day before filing this motion, *not* including the filing fee for this motion) is \$7,715.25.

33. The above figures do not include time that Class Counsel will incur between the filing of this Fee Motion and final approval. I estimate that I will spend at least 25.0 hours (\$11,875) on this case preparing the motion for final approval, appearing at the final approval hearing, communicating with class members, and assisting as needed with resolving any disputes that might arise with respect to the amount owed pursuant to any New Agreement. My co-counsel William Kennedy estimates that he will spend at least 10.0 hours (\$6,000) preparing the motion for final approval, appearing at the final approval hearings, and assisting with settlement administration. Kennedy Decl. ¶ 10.

34. In total, I anticipate that Class Counsel will have spent 1,017.5 hours on this case, equaling \$441,205 in attorney fees and \$7,715.25 in costs in prosecuting this case, for a total of \$448,920.25 in attorneys' fees and costs.

¹ My July 28, 2023 declaration in support of preliminary approval of the settlement recorded 125 hours of law clerk time (7/28/23 Sequoia Decl. ¶ 7), but in preparing this Fee Motion, it has come to my attention that I erroneously reported the number of time entries, not the actual number of hours spent. The actual number of law clerk hours is 177.4, as reflected in Exhibit A.

EXHIBIT A

Time Billing Summary

Botcher et. al. v. Make School et. al., Case No. CGC-21-592710

Reporting period: February 2021 to November 6, 2023

Name	1	2	3	4	5	6	7	8	9	10	11	Total Hours	Hourly Rate	Lodestar
Melody Sequoia (Attorney)	68.3	169.7	26.4	80.8	7.6	23.4	165.3	27.4	24.6	12.6	120.1	726.2	\$475	\$344,945
Hannah Odekirk (Law Clerk)	20.9	9.3	29	0.7	0	20	66.6	6.8	16.9	7.2	0	177.4	\$175	\$31,045
Totals	89.2	179	55.4	81.5	7.6	43.4	231.9	34.2	41.5	19.8	120.1	903.6		\$375,990

Categories:

1	Investigation and factual research
2	Client meetings and communications
3	Discovery
4	Pleadings, briefs, pre-trial motion, and stipulations
5	Court appearances
6	Participation in claims process for Make School ABC
7	Settlement efforts
8	Litigation strategy and analysis
9	Participation in regulatory investigations relating to litigation
10	Case management and administration
11	Class action approval and settlement administration

EXHIBIT B

Cost Summary

Botcher et. al. v. Make School et. al., Case No. CGC-21-592710

Reporting period: February 2021 to November 6, 2023

Description	Expense
Filing Fees (including required courtesy copies)	\$2,957.91
Mediation Fees	\$4,663.34
Other - CourtCall	\$94.00
Total Expenses	\$7,715.25

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is 3000 El Camino Real, Suite 4-200, Palo Alto, CA 94306.

On the date written below, I served the following document(s): **DECLARATION OF MELODY L. SEQUOIA, ESQ. IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS**

- (By U.S. Mail)** By placing the document(s) listed above in a sealed envelope with Postage thereon fully prepaid, in the United States Mail in Menlo Park, California, addressed as set forth below.
- (Electronic Service)** By electronically serving a true copy thereof to the e-mail address(es) listed in accordance with Code of Civil Procedure 1010.6(b), California Rules of Court, Rules 2.253(b).
- (File & ServeXpress)** I electronically filed and served the above document(s) utilizing File & ServeXpress on November 7, 2023. Counsel of records are required by the Court to be registered to electronically file and serve on this case and are designated accordingly on the Transaction Receipt located on the File & ServeXpress website.
- (By Personal Service)** By personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

PARTIES SERVED:

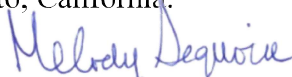
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 St. George, UT 84791

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct to the best of my knowledge.

Executed on November 7, 2023 at Palo Alto, California.



 Melody L. Sequoia

1 Melody L. Sequoia, Esq. (SBN: 309163)
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7 William Kennedy (SBN: 158214)
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9 **Consumer Law Office of William E. Kennedy**
10 2797 Park Ave., Suite 203
11 Santa Clara, CA 95050-1500
12 Office: (408) 241-1000

13 *Attorneys for Plaintiffs and the putative class*

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN FRANCISCO**

16 ERIC BOTCHER, and SAMUEL D.
17 GALIZIA, individually and on behalf of all
18 others similarly situated

19 Plaintiffs,

20 v.

21 MAKE SCHOOL PBC f/k/a MAKE
22 SCHOOL INC., MAKE SCHOOL ABC,
23 LLC, MAKE SCHOOL ISA SPV, LLC,
24 VEMO EDUCATION, INC., and DOES 1
25 through 10,

26 Defendants.

Case No. CGC-21-592710

**DECLARATION OF WILLIAM E.
KENNEDY IN SUPPORT OF
MOTION FOR ATTORNEYS' FEES
AND COSTS AND INCENTIVE AWARDS**

Hearing

Date: March 22, 2024

Time: 9:00 a.m.

Dep't: 304

Judge: Hon. Ethan P. Schulman

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

11/07/2023
Clerk of the Court
BY: VERA MU

Deputy Clerk

1
2 I, WILLIAM E. KENNEDY, declare as follows:

3 1. I have personal knowledge of the facts set forth herein, and if called to testify
4 thereto, I could and would do so competently.

5 2. I am an attorney in good standing with the State Bar of California. I am the
6 founder and owner of Consumer Law Office of William E. Kennedy, a counsel of record for
7 Plaintiffs in this action. I submit this declaration in support of Plaintiffs’ Motion for Attorneys’
8 Fees and Costs in this matter (“Fee Motion”).

9 3. In its order preliminarily approving the class action settlement in this matter, the
10 Court preliminarily appointed me and my co-counsel, Melody L. Sequoia, as counsel for the
11 Settlement Class (“Class Counsel”), finding that Class Counsel is capable of exercising all
12 responsibilities as Class Counsel.

13 **My Work On This Case**

14 4. I became involved in this case at the invitation of co-counsel Melody L. Sequoia.
15 My involvement began on approximately May 23, 2022, approximately one week after Plaintiffs
16 and the defendants had reached a class settlement at a May 18, 2022 mediation. Although in a
17 broad sense, the case was “settled,” there remained a substantial number of vigorously disputed
18 issues which remained to be negotiated with Defendants. I participated in at least 21 zoom calls
19 with defense counsel during the course of this litigation. Most of these calls were negotiation
20 sessions, but there were also some calls related to the motion for preliminary approval and class
21 administration issues. I conferred with Ms. Sequoia regularly concerning Plaintiffs’ positions on
22 the many disputed issues. In addition, I performed legal research on a few issues which arose
23 during negotiations. In approximately October 2022, though some issues were still unresolved,
24 the parties began to exchange settlement agreement drafts. The parties continued negotiations,
25 as they exchanged versions of the settlement agreement, class notice, and other documents that
26

1 would eventually accompany the motion for preliminary approval. I spent a total of 58.3 hours
2 on the activities described in this paragraph, which I label as “Negotiation” in the chart below.

3 5. After the initial motion for preliminary approval was filed on April 28, 2023, the
4 Court issued a tentative ruling requesting information and expressing reservations about the
5 settlement agreement. After the parties submitted additional and revised materials, the Court

6 6. again issued a tentative ruling expressing continued reservations. I spent 11.0
7 hours working to address the Court’s questions and concerns, in anticipation of the August 15,
8 2023 hearing on the motion. I label this time as “Address Tentative” in the chart below.

9 7. There were also issues unrelated to the negotiations that had to be worked
10 through, particularly regarding converting the individual action to a class action. I spent 2.8
11 hours on these issues. I label this time as “Non-Negotiation Issues” in the chart below.

12 8. I spent 2.8 hours with respect to the administration of the class settlement,
13 including time spent on the stipulation extending the class notice deadlines recently submitted to
14 the Court. I label this time as “Class Administration” in the chart below.

15 9. I have spent 4.0 hours on the instant motion, which I label as “Attorneys’ Fees” in
16 the chart below.

17 10. In summary, I spent the following amount of time on the following activity
18 categories:

19

Activity Category	Number of Hours Spent
Negotiation	58.3
Address Tentative	11.0
Non-Negotiation Issues	2.8
Class Administration	2.8
Attorneys’ Fees	4.0
Total	78.9 hours

1 11. I expect to spend an additional 10.0 hours on this litigation, preparing the motion
2 for final approval, appearing at the final approval hearings, and assisting with settlement
3 administration. Therefore, the total amount of time I expect to spend on this case is 88.9 hours.

4 12. I kept contemporaneous time records for my work on this case and bill in
5 increments of six minutes (0.1 hour). I did not bill for purely administrative tasks such as time
6 spent, photocopying, printing, and downloading files. Throughout the pendency of this
7 lawsuit, I exercised my best judgment to excise some hours actually expended that I believed
8 exceeded the time required for the task.

9 13. I handled this case on a contingency basis.

10 **Hourly Rate**

11 14. I seek an hourly rate of \$600.00 per hour. The most recent decision in which a
12 Court ruled on my hourly rate was *Norton v. LVNV Funding, LLC*, No. 18-CV-05051-DMR,
13 2022 WL 562831, at *11 (N.D. Cal. Feb. 24, 2022), where the court approved a rate of
14 \$600.00. Norton was a class action based on the Fair Debt Collection Practices Act. The
15 Norton decision is attached as Exhibit 1.

16 15. The second most recent ruling on my hourly fee was in 2017, in *Castillo v.*
17 *Nationstar Mortg. LLC*, No. 15-CV-01743-BLF, 2017 WL 6513653 (N.D. Cal. Dec. 20, 2017);
18 Castillo involved an action by an individual against a mortgage servicer. Following a
19 contested fee motion, I was awarded the hourly rate I requested -- \$550.00, by the Hon. Beth
20 Labson Freeman. Castillo, *supra*, at *4. The Castillo decision is attached as Exhibit 2.

21
22 **Experience**

23 16. I began practicing law in 1990 at Neighborhood Legal Services in Washington,
24 D.C. as a member of the Washington D.C. bar. Neighborhood Legal Services is a legal aid
25

1 organization providing services to low-income clients. Since January, 1993, I have practiced
2 law at my own office in Santa Clara, California. In all, I have practiced law for over 32 years.

3 17. I have been co-counsel in the following certified class action lawsuits all of which
4 reached a settlement which conferred financial benefits on class members:

- 5
- 6 a. *Wilson et al. v. Fidelity Water System, Inc.*, Case #C 97-20118 RMW (N.D. Cal.)
7 (challenged the sales and financing practices of a door-to door seller of water
8 treatment systems and a related finance company.)
- 9 b. *Smith v. GMAC*, Santa Clara County Superior Court Case #CV 776 152; (Rees-
10 Levering Automobile Sales Finance Act, Business and Professions Code §17200);
- 11 c. *Gonzalez v. Bank of the West*, Santa Clara County Superior Court Case
12 #CV777378 (Rees-Levering Automobile Sales Finance Act, Business and
13 Professions Code §17200)
- 14 d. *Acosta v. Sunstar*, Santa Clara County Superior Court Case #CV 776928; (Rees-
15 Levering Automobile Sales Finance Act, Business and Professions Code §17200)
- 16 e. *Navarette v. TD Banknorth, N.A.*, Case #07-02767 JW, (N.D. Cal.) (Truth in
17 Lending Act)
- 18 f. *Latora v. Unitrin Direct Insurance Company*, Alameda County Superior Court
19 Case No. VG 06275384 (automobile insurance)
- 20 g. *Swain v. CACH, LLC*, Northern District of California Case #C-08-05562 JW (Fair
21 Debt Collection Practices Act/Rees-Levering Automobile Sales Finance Act)
- 22 h. *Herrera v. LCS Financial Services Corp.*, No. C09-02843 TEH, (N.D.Cal.) (Fair
23 Debt Collection Practices Act)
- 24
25
26

- 1 i. *Barnes v. American Residential Services, L.L.C.*, Santa Clara County Superior
2 Court, Case No. 1-10-CV-183947 (Consumer Legal Remedies Act and other
3 consumer statutes related to plumbing services)
- 4 j. *Newton v. America Debt Services, Inc.*, Northern District of California, Case No.
5 3:11-cv-03228 EMC (Business and Professions Code § 17200 related to debt
6 settlement service)
- 7 k. *Norton v. LVNV Funding, LLC*, Northern District of California, Case No. 18-CV-
8 05051-DMR (Fair Debt Collection Practices Act)

9
10 18. In addition, I have been class counsel or co-counsel in the following cases which
11 were resolved by a settlement which conferred substantial monetary benefits pursuant to
12 Business and Professions Code § 17200 et seq. to “class” members (i.e. members of the
13 general public affected by the challenged practice) without class certification. These cases
14 were litigated prior to the passage of Proposition 64, which amended section 17200 et seq.:

- 15
16 a. *Yu v. Signet Bank/ Virginia and Capital One Bank, Alameda County Superior*
17 *Court Case No. H-184674-8*, 69 Cal.App.4th 1377 (1999), 103 Cal. App. 4th 298
18 (2002) (distant forum abuse by credit card issuer)
- 19 b. *Reyes v. Citibank*, Santa Clara County Superior Court Case No. 1-00-CV-793325
20 (levy of protected Social Security benefits)
- 21 c. *Pettyplace v. Monterey County Bank and Genesis Financial Solutions, Inc.*,
22 Northern District of California Case No. C-06-02139 JF HRL (violation of the
23 Fair Debt Collection Practices Act)
- 24 d. *Genesis Financial Solutions, Inc. v. Gutierrez*, Alameda County Superior Court
25 Case No. VG05-0226845 (violation of the Fair Debt Collection Practices Act)
- 26

1 **Law Related Memberships/Activities**

2 I have been involved in the following law-related activities:

- 3 • Founder, Lawyers in the Library program (Santa Clara County)
- 4 • President, Barrister's Section of Santa Clara County Bar Association (1998)
- 5 • Committee member - Consumer Advisory Committee of the State Bar of
- 6 California, (1996-97)

7 **Other Civic Activities**

8 I have been involved in the following Civil Activities

- 9 • City Councilmember - City of Santa Clara (elected position) (2004-2012).

10 **Awards**

11 I have received the following awards:

- 12 • Barrister of the Year, Santa Clara County Bar Association (1996)
- 13 • Pro Bono Project of Silicon Valley - Lois Kittle Award (2002)
- 14 • Nancy and Eric Wright Award - Katherine and George Alexander Community
- 15 Law Center (2012)

16

17

18

19 I declare under penalty of perjury under the laws of the State of California that the

20 foregoing is true and correct.

21

22 Dated: November 7, 2023

23 
William E. Kennedy

EXHIBIT 1

2022 WL 562831

Only the Westlaw citation is currently available.

United States District Court, N.D. California.

Sonya NORTON, Plaintiff,

v.

LVNV FUNDING, LLC, et al., Defendants.

Case No. 18-cv-05051-DMR

I

Signed 02/24/2022

Attorneys and Law Firms

[Gina C. Di Giusto](#), Housing & Economic Rights Advocates, Oakland, CA, [William Eric Kennedy](#), Law Offices of William E. Kennedy, Santa Clara, CA, for Plaintiff.

[Tomio Buck Narita](#), [Margaret T. Cardasis](#), [Robert Travis Campbell](#), Simmonds & Narita LLP, San Francisco, CA, for Defendants.

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARDING ATTORNEYS' FEES AND COSTS

Re: Dkt. Nos. 138, 143

[Donna M. Ryu](#), United States Magistrate Judge

*1 Plaintiff Sonya Norton filed this putative class action against Defendants LVNV Funding, LLC (“LVNV”) and Law Office of Harris & Zide (“H&Z”) (collectively, “Defendants”) alleging violations of the federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and California’s Fair Debt Collection Practices Act (“Rosenthal Act”), Cal. Civ. Code § 1788 *et seq.* Norton also seeks injunctive relief under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Profs. Code § 17200 *et seq.* On July 23, 2021, the court granted preliminary approval of a class action settlement (“Prelim. Approval Order”). [Docket No. 137.] Plaintiff now seeks final approval of the settlement (“Approval Mot.”). [Docket No. 143.] Plaintiff also moves for an award of attorneys’ fees and costs (“Fees Mot.”). [Docket No. 138.] Defendants do not oppose the motion for attorneys’ fees but filed a limited opposition to the final approval motion (“Opp’n”), to which Norton replied (“Reply”). [Docket Nos.

145, 146.] The court held a hearing on January 13, 2022. For the reasons stated below, both motions are granted.

I. BACKGROUND¹

On October 21, 2008, non-party Arrow Financial Services, LLC (“Arrow”) filed a collections action against Norton in San Mateo County Superior Court, alleging that Norton failed to tender owed amounts to Arrow. *See* Third Amended Complaint (“TAC”) ¶ 14. [Docket No. 48.] On December 26, 2008, the state court entered a default judgment against Norton in the amount of \$3,986.60. *Id.* ¶ 15. On February 24, 2012, H&Z filed a substitution of counsel to appear on behalf of Arrow in the state court action. *Id.* ¶ 16; *Id.*, Ex. 2. On May 17, 2012, H&Z caused a writ of execution to issue from a state court in the amount of \$5,853.07. *Id.* ¶ 17. Norton’s wages were garnished in the amount of \$323.55 in August and September 2012. *Id.* Defendants sought and obtained five more writs of execution between December 27, 2013 and September 1, 2017. *Id.* ¶¶ 17-25. On November 29, 2017, Norton filed a claim of exemption in response to the garnishment of her wages. *Id.* at ¶ 30. Through December 2017, Defendants allegedly garnished over \$1,000 from Norton’s paycheck. *Id.* ¶¶ 31-32. On December 15, 2017, an attorney at Housing and Economic Rights Advocates (“HERA”) wrote a letter to H&Z on Norton’s behalf stating that the wage garnishment appeared to be improper because, unknown to Norton, Arrow had filed a Certificate of Cancellation with the California Secretary of State in October 10, 2012. *Id.* ¶ 37. No other party had established itself as Arrow’s assignee of record. *Id.* H&Z subsequently filed a notice terminating the garnishment of Norton’s wages. *Id.* Norton was “reimbursed some, but not all” of her garnished wages. *Id.* ¶ 39.

On February 13, 2018, an H&Z attorney informed Norton’s attorney at HERA that H&Z represented LVNV rather than Arrow. *Id.* ¶ 36. According to Norton, LVNV had acquired the judgment against her from Arrow in 2012 but did not disclose this fact to the state court or to Norton until 2018. *Id.* ¶¶ 41-43. On May 11, 2018, Norton filed a motion in the state court action to quash the prior writs of execution. *Id.* ¶ 40. On June 29, 2018, the court granted the unopposed motion on the grounds that “no acknowledgment of assignment of judgment has been filed as required by [Code of Civil Procedure § 673](#).” *Id.* On September 7, 2018, H&Z filed an Acknowledgment of Assignment of Judgment in the state court action pursuant to [California Code of Civil Procedure § 673](#); it acknowledges

the assignment of the judgment against Norton from Arrow to LVNV. [Docket No. 37-1, Ex. B.]

*2 In this lawsuit, Norton contends that Defendants were prohibited from taking judicial action to enforce the judgment without first complying with [section 673](#). She asserts individual and class claims under the FDCPA, the Rosenthal Act, and the UCL.

On October 6, 2020, the court certified a class encompassing all California residents who meet the following conditions defined as follows:

- a. LVNV Funding, LLC, represented by Law Office of Harris & Zide, took judicial action (including obtaining Writs of Execution, wage garnishment, and bank levy) after August 17, 2014 (four years prior to the filing of this action) to collect a judgment based on a consumer debt obtained in a California court;
- b. Arrow Financial Services, LLC was the plaintiff of record at the time the judgment was entered; and
- c. LVNV Funding, LLC did not file an Assignment of Judgment in conformity with [California Code of Civil Procedure § 673](#) or otherwise become the assignee of record.

See Order on Motion for Class Certification at 4 [Docket No. 103]. The certified class encompassed a four-year class period corresponding to the statute of limitations for UCL claims. The court also certified a subclass defined identically as the class but with a class period limited to August 17, 2017 to the present, corresponding to the statute of limitations for FDCPA and Rosenthal Act claims.

Thereafter, the parties engaged in mediation and reached a settlement to resolve all of Norton's claims. Norton filed a first motion for preliminary approval of the settlement on March 11, 2021. [Docket No. 118.] During the hearing, the court raised several concerns about the settlement. The parties agreed to withdraw the motion and renegotiate certain terms. They filed a new motion for preliminary approval on May 28, 2021. [Docket No. 132.] The court held a second hearing and granted the motion on July 23, 2021.

The settlement agreement (“Agreement”) provides for (1) reimbursement, with interest, of all amounts Defendants collected from class members; (2) a total of \$50,000 to be distributed to subclass members equally; (3) withdrawal of all claims court costs and interest on court costs for open counts,

and (4) complete cessation of collective activity on closed activity. Agreement §§ 4.04–4.03.² The specific terms of the Agreement and the court's preliminary evaluation of those terms are set forth in detail in the court's preliminary approval order and are not repeated here. Prelim. Approval Order at 4–8.

II. CAFA NOTICE

The Class Action Fairness Act (“CAFA”) requires that each defendant serve a notice containing certain required information upon the appropriate state and federal officials within ten days of the filing of a proposed settlement. [28 U.S.C. § 1715\(b\)](#). CAFA also prohibits a court from granting final approval until ninety days have elapsed since notice was served under that provision. *Id.* [§ 1715\(d\)](#). This case is subject to CAFA's requirements.

*3 The Claims Administrator for this case, CPT Group, Inc., (“CPT”) confirmed that it provided CAFA notice on June 7, 2021. Declaration of Katie Tran (“Tran Decl.”) ¶ 4 [Docket No. 143-2.] The parties also represented at the second preliminary approval hearing that CAFA Notice was complete. See Prelim. Approval Order at 26. Accordingly, the CAFA notice requirement has been satisfied.

III. MOTION FOR FINAL APPROVAL

“The Ninth Circuit maintains a ‘strong judicial policy’ that favors the settlement of class actions.” *McKnight v. Uber Techs., Inc.*, No. 14-cv-05615-JST, 2017 WL 3427985, at *2 (N.D. Cal. Aug. 7, 2017) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). The settlement of a certified class action must be “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). “The court's role in reviewing a proposed settlement is to represent those class members who were not parties to the settlement negotiations and agreement.” *Tadepalli v. Uber Techs., Inc.*, No. 15-cv-04348-MEJ, 2016 WL 1622881, at *6 (N.D. Cal. Apr. 25, 2016). The court maintains an independent duty to examine the fairness of the settlement under [Rule 23\(e\)](#) and the factors articulated in *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004). See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

In granting the motion for preliminary approval, the court thoroughly examined the fairness of the settlement under the [Rule 23\(e\)\(2\)](#) factors, the *Churchill Village* factors, and the Northern District of California's Procedural Guidance for

Class Action Settlements (“Procedural Guidance”).³ Prelim. Approval Order at 8-27. The court need not revisit its prior findings and addresses only the matters that could not be resolved at preliminary approval: (1) whether notice to the class was effective; (2) whether the class member response was favorable; (3) whether the requested attorneys’ fees and costs are reasonable; and (4) whether Norton is entitled to a service payment, also known as an incentive award.⁴ The court also addresses the suitability of the parties’ intended *cy pres* recipient.

A. Adequacy of Notice

Rule 23 requires the court to consider “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” **Fed. R. Civ. P. 23(e)(2)(C)(ii)**. “Adequate notice is critical to court approval of a class settlement under **Rule 23(e)**.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). “[N]otice must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ ” *Tadepalli*, 2016 WL 1622881, at *6 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

The court previously found that the Agreement's provisions for class notice were adequate and reasonably calculated to apprise class members of their rights under the settlement. Prelim. Appr. Order at 18-20; *see* Agreement § 5.05, Ex. A. The court also found that the claims process was not burdensome. Prelim. Appr. Order at 20; *see* Agreement, Ex. B.

*4 The Procedural Guidance requires class counsel to provide the numbers of undeliverable class notices and class members who submitted valid claims. According to CPT's declaration, the class notice was sent via U.S. Mail to 453 class members on September 21, 2021. Tran Decl. ¶ 6. Of those, the post office forwarded five notices to new addresses and returned thirty notices to CPT as undeliverable and without a forwarding address. *Id.* ¶ 7. CPT then located new addresses for twelve individuals and re-mailed the notices to them. *Id.* Ultimately, eighteen class notices remain undeliverable. CPT established a settlement website as well as a twenty-four-hour toll-free hotline and email address to communicate with class members. *Id.* ¶¶ 5, 8-9.

CPT reports that it received fifty-six total responses to the notice, of which twelve were duplicates and thus deemed invalid. Tran Decl. ¶ 11-12. CPT determined that forty-four class members—of which twenty-five were sub-class members—submitted valid claims. *Id.* ¶ 14. (The court addresses a dispute over two claims in the next sections). CPT collected \$140,575.51 from the class members with valid claims. *Id.* Of the 453 notices mailed, only eighteen were ultimately not delivered, meaning that 96 percent of notices were successfully mailed. Only forty-four notices mailed resulted in actual claims, which the court independently calculates as a claims rate of about ten percent. This rate falls at the high end of the expected claim rate of five to ten percent that the parties previously represented to the court. *See* Prelim. Approval Order at 19. Therefore, the court finds that the notice distribution plan was the “best notice that is practicable under the circumstances,” consistent with **Rule 23(c)(2)**.

1. Rosa Castaneda's Claim

The parties contest the validity of two class member's claims.⁵ CPT received a claim request from an individual named Rosa Vazquez, who enclosed a name change petition with her claim form. Tran Decl. ¶ 13; Supplemental Declaration of Katie Tran (“Tran Suppl. Decl.”) ¶ 3 [Docket No. 146-1].⁶ Defendants’ affidavit includes this individual's initial claim form signed by Rosa Castaneda. Declaration of R. Travis Campbell (“Campbell Decl.”) Ex. A [Docket No. 145-1.] The enclosed petition—which the Central District of California granted on March 1, 2011—reflected a request by an individual named Rosa Maria Castaneda Robles to legally change her name to Rosa Maria Castaneda as part of her naturalization process. *Id.* On December 10, 2021, CPT emailed a spreadsheet to class and defense counsel containing responses it received from class members, including one by a claimant named Rosa Vazquez or Rosa Castaneda. Campbell Decl. ¶ 2; Supplemental Declaration of William Kennedy (“Kennedy Suppl. Decl. ¶¶ 2-3) [Docket No. 146-2.] The spreadsheet marked Castaneda's claim form as deficient. Kennedy Suppl. Decl. ¶ 3. Class counsel William Kennedy acknowledged receipt of the spreadsheet, informed CPT that he would challenge that determination, and requested further information about it. Campbell Decl. Ex. B. The class administrator replied on December 13, 2021 that “Rosa Vazquez's claim form is deficient since we were unable to locate her name in the provided name change document. The name on the provided document shows Rosa Maria Castaneda

Robles.” Campbell Decl. Ex. B.; *see* Kennedy Suppl. Decl. ¶ 4. Kennedy attests that “[t]he email did not mention that CPT was, or would be in communication with Ms. Castaneda to obtain additional information.” Kennedy Suppl. Decl. ¶ 4.

*5 Kennedy then wrote Castaneda a letter informing her that her claim form was deemed invalid out of concern that she might “lose out on her opportunity to obtain financial benefits from the class settlement.” Kennedy Suppl. Decl. ¶ 5. He said he “believe[d] it was his duty as class counsel to assist class members ... and did not realize that CPT would be working with Ms. Castaneda to obtain the additional information.” *Id.*

On December 21, 2021, class counsel replied that he “made contact with [Castaneda] and ha[s] worked with her to prepare the attached declaration.” *Id.* Ex. C. His email enclosed a sworn declaration from Castaneda in which she stated that her given name at birth was Rosa Maria Castaneda Robles, but that she “generally used the name Rosa Vazquez” after she married and adopted her husband's last name. *Id.* Ex. D. ¶¶ 2-3. After she naturalized, she decided to change her name to “Rosa Maria Castaneda.” *Id.* ¶ 4. She received a claim form addressed to “Rosa Vazquez,” although the wages garnished from her employer were under “Rosa Castaneda.” *Id.* ¶ 6. Castaneda provided her marriage certificate, wage garnishment order, a pay stub, a letter from San Bernardino County, and her driver's license that alternate between using the names Rosa Vazquez and Rosa Castaneda. *Id.* ¶¶ 8-10. After receiving this email and declaration, CPT determined that Castaneda presented a valid claim and updated her claim form to reflect her name as Rosa Maria Castaneda Robles. Campbell Decl. ¶ 6; Tran Decl. ¶ 13.

According to the class administrator, CPT mailed a letter to Castaneda on December 21, 2021 requesting additional documentation about her name change. Tran Suppl. Decl. ¶ 4. Castaneda replied by phone and email to CPT on December 29. *Id.* ¶¶ 4-5. CPT communicated with her and reviewed her supporting documentation, and thereafter determined her information was sufficient, approved her name change, and updated her claim form as “Rosa Maria Castaneda Robles.” *Id.* ¶ 7.

Nevertheless, Defendants challenged Castaneda's claim because of Kennedy's communications with her. Opp'n at 2. The Agreement prohibits counsel from “attempting to affirmatively contact Class Members to discuss the litigation, the Settlement or the contents of or response to the Claim Form. Class Counsel may, however, respond to any questions

from potential Class Members if the potential Class Members contact Class Counsel first.” Agreement § 5.09. Kennedy's own email to CPT and Defendants' counsel plainly states that he contacted Castaneda after CPT's attempts. Campbell Decl. Ex. C. However, Kennedy admits that he “did not think about the prohibition in the Settlement Agreement on direct communications with class members when [he] sent the letter to Ms. Castaneda.” Kennedy Suppl. Decl. ¶ 5. He avers that he “believe[d] the provision was negotiated by Defendants to prohibit Class Counsel from advising Class Members as to the definition of ‘consumer debt’ during the claim process, and did not think of the applicability of the provision outside of that context.” *Id.*⁷

*6 Based on Castaneda's documentation and the class administrator's sworn affidavits, the court is satisfied that Rosa Vazquez and Rosa Castaneda is the same person. Therefore the court overrules Defendants' objection and permits her claim. As the court stated at the fairness hearing, while the plain language of the Agreement bars communications initiated by class counsel to class members, the appropriate remedy for this violation is not invalidating an otherwise valid claim. CPT communicated with Castaneda apart from Kennedy. CPT's own independent investigation of Castaneda's name and claim, as attested by the claim administrator, resulted in its determination that she had a valid claim—not any steps taken by Kennedy. Because there is no evidence that Castaneda's claim is invalid, the court will not penalize her for actions performed by class counsel.

The court finds that Kennedy did violate the terms of the settlement, even if not purposefully or willfully, and admonishes him for initiating an improper communication with a class member.

2. Rosa Della Porta's Claim

Norton also challenges CPT's ruling invalidating a late claim by Rosa Della Porta as untimely.⁸ Della Porta claims \$232.86 from the settlement and an equal share of \$50,000 as a subclass member. [Docket No. 148-2.] Della Porta represents that she signed and mailed her claim form to CPT on November 15, 2021 (before the December 6 deadline for responses). Kennedy Suppl. Decl. Ex. 2 (Declaration of Rosa M. Della Porta (“Della Porta Decl.”)) ¶ 2 [Docket No. 146-3]; *see* Della Porta Decl. Ex. 2 (Della Porta's claim form dated November 15, 2021). However, she inadvertently switched the addresses on her envelope, thereby placing CPT's address where her

return address should go, and vice versa. *Id.* ¶ 2. The post office returned her envelope to her on January 6, 2022. *Id.* ¶ 4. Della Porta then contacted Kennedy and CPT. *Id.* ¶ 5. CPT instructed her to send them a copy of the envelope and claim form, which she did on January 10. *Id.* ¶ 5. CPT determined that her claim form was “untimely but otherwise valid.” Declaration of William Kennedy Ex. 1 [Docket No. 148-1.] Class counsel thereafter challenged CPT’s ruling; Defendants did not file an opposition or statement of non-opposition. [Docket No. 1487.]

“A district court has discretion to allow late claims to a settlement fund.” *Lemus v. H & R Block Enters., LLC*, No. C 09-03179 SI, 2013 WL 3831866, at *2 (N.D. Cal. July 23, 2013) (citing *In re Valdez*, 289 F. App’x 204, 206 (9th Cir. 2008)); see *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977). Multiple circuits had held that the court maintains an inherent equitable power to “allow late-filed proofs of claim and late-cured proofs of claim.” *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 195 (3d Cir. 2000); accord *Burns v. Elrod*, 757 F.2d 151, 155 (7th Cir. 1985); *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972); cf. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1993) (recognizing that “the district court has discretion to extend a class member’s time to opt out” of a class settlement). The Manual for Complex Litigation also recommends that “[t]he court should allow adequate time for late claims before any refund or other disposition of settlement funds occurs.” *Manual for Complex Litigation (Fourth)* § 21.662 (2004). Courts regularly permit late-filed claims for “excusable neglect” or “good cause.” See *Silber*, 18 F.3d at 1455; *Gypsum*, 565 F.2d at 1128; see also *Valdez*, 289 F. App’x at 206 (noting that district court permitted late-filed claims by claimants with “plausible excuses for not filing timely”). The excusable neglect inquiry contemplates “the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993).

*7 The court overrules CPT’s determination and permits Della Porta’s claim. The evidence in her declaration shows that she mailed her claim well before the deadline for filing claims—December 6, 2021. Her error addressing the envelope was inadvertent, and she received her mis-addressed envelope back after the deadline expired because of processing delays by postal service. Promptly thereafter she contacted class counsel and provided a sworn affidavit

testifying as to what happened, evidencing her good faith attempts to fix the problem. CPT expressly declared her claim otherwise valid. Good cause accordingly supports class counsel’s request to permit Della Porta’s claim.

B. Class Members’ Response

“Courts have repeatedly recognized that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *De Leon v. Ricoh USA, Inc.*, No. 18-cv-03725-JSC, 2020 WL 1531331, at *11 (N.D. Cal. Mar. 31, 2020) (citation omitted); *Churchill Vill., L.L.C.*, 361 F.3d at 577. “A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval.” *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015). The Procedural Guidance requires class counsel to provide the numbers of class members who opted out of the settlement, and class members who objected to the settlement

Here, no class members have opted out of the settlement. Tran Decl. ¶ 15. Nor has the clerk’s office or the Claims Administrator received any objections to the settlement by the deadline. *Id.* ¶ 16; see also Dec. 22, 2021 Report on Exclusions of Class Members [Docket No. 142.]. The lack of exclusions or objections “indicat[es] overwhelming support among the class members.” *McLeod v. Bank of Am., N.A.*, No. 16-CV-03294-EMC, 2019 WL 1170487, at *3 (N.D. Cal. Mar. 13, 2019) (quotation omitted); see also *Schuchardt v. L. Off. of Rory W. Clark*, 314 F.R.D. 673, 686 (N.D. Cal. 2016) (final approval warranted in FDCPA and Rosenthal Act case where three percent of the class opted out and no class members objected). This overwhelmingly support from the class weighs strongly in favor of granting final approval.

C. Cy Pres Award

A *cy pres* award is “a tool for ‘distributing unclaimed or non-distributable portions of a class action settlement fund to the next best class of beneficiaries.’” *In re Google Inc. St. View Elec. Commc’ns Litig.*, 21 F.4th 1102, 1111 (9th Cir. Dec. 27, 2021) (quoting *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)). “It is well established in this circuit that district courts may approve settlements with *cy pres* provisions that affect only a portion of the total settlement fund.” *Id.* “*Cy pres* distributions must account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class

members, including their geographic diversity.” *Nachshin*, 663 F.3d at 1036.

The court previously acknowledged but did not rule on the parties’ proposed *cy pres* distribution. *See* Prelim. Approval Order at 7, 17. The court finds that the *cy pres* proposal is fair and reasonable. The Agreement provides that the aggregate amount of any uncashed settlement checks shall be distributed to the Katherine & George Alexander Law Center. Agreement § 5.20. The Law Center is the clinical civil program for Santa Clara School of Law and a unit of Santa Clara University. Declaration of Scott Maurer (“Maurer Decl.”) ¶ 3 [Docket No. 143-3.] The Law Center provides regular brief service advice clinics, including at the Santa Clara County Superior Court, and full representation to primarily low-income clients with consumer and/or debt issues. *Id.* ¶¶ 4-5. The most common issue for clinic clients at the superior court relate to collection activity by debt buyers. *Id.* ¶ 4. Other courts have previously approved the Law Center as an appropriate *cy pres* recipient in settlements in other consumer-debt related class actions. *See, e.g., Newton v. Am. Debt Servs., Inc.*, No. 11-cv-3228-EMC, 2016 WL 7757521 (N.D. Cal. July 1, 2016); Maurer Decl. ¶ 6 (citing cases in state court).

*8 The Law Center’s mission to provide legal assistance to low-income individuals with consumer is sufficiently related to the subject at the heart of this case and the objectives of the FDCPA and the Rosenthal Act to protect consumers against abusive and deceptive practices by debt collectors. *See Turner v. Cook*, 363 F.3d 1219, 1226 (9th Cir. 2004); Cal. Civ. Code § 1788.1(b). The court accordingly finds that the Law Center is an appropriate *cy pres* recipient.

D. Service Award

Norton also seeks a \$7,000 service award for her work on behalf of the class. Defendants counter that she should receive “no more than \$5,000,” which is this district’s presumptively reasonable service award amount. Opp’n at 3. The Agreement provided that she would apply for an award up to \$7,000; Defendants would not oppose an award up to \$2,000 and reserved their right to object to an award in excess of that amount. Agreement § 6.01.

“Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit.” *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). They are “intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing

the action, and, sometimes, to recognize their willingness to act as a private attorney general. Awards are generally sought after a settlement or verdict has been achieved.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)

“In order to evaluate the reasonableness of the size of a service award, the Ninth Circuit looks to ‘the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment.’ ” *Nevarez v. Forty Niners Football Co., LLC*, 474 F. Supp. 3d 1041, 1048 (N.D. Cal. 2020) (quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015)). Awards of \$5,000 are presumptively reasonable in this district. *See, e.g., id.; In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 536661, at *9 (N.D. Cal. Feb. 11, 2019); *Villanueva v. Morpho Detection, Inc.*, No. 13-cv-05390-HSG, 2016 WL 1070523 (N.D. Cal. Mar. 18, 2016). The Procedural Guidance requires that “all requests for incentive awards must be supported by evidence of the proposed awardees’ involvement in the case and other justifications for the awards.”

As Norton seeks a service award higher than the presumptively reasonable level, the court scrutinizes her request carefully. Norton recounts that she has been in frequent contact with her attorneys through the litigation. Declaration of Sonia Norton (“Norton Decl.”) ¶ 6 [Docket No. 143-4.] She provided them with information and documents and met with her attorneys to prepare responses to Defendants’ discovery requests. *Id.* She had her deposition taken and spent several hours preparing with her attorneys beforehand. *Id.* ¶ 3. She also attended two mediation sessions. *Id.* ¶¶ 4-5. Norton does not quantify the amount of time that she spent working on the case.

Norton’s work on behalf of the class appears typical of other named plaintiffs in these cases. Other courts have awarded \$5,000 or less to class representatives for performing similar tasks. *See, e.g., Villanueva*, 2016 WL 1070523, at *7 (awarding \$2,500 where “[p]laintiff helped class counsel investigate the claims, connected class counsel with putative class members, helped respond to written discovery, sat for a full-day deposition, and attended a full-day ADR session.”); *In re Toys R Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 471 (C.D. Cal. 2014) (\$5,000 where “plaintiffs expended reasonable efforts on the litigation” including responding to “intrusive

discovery” and “regular[] and consistent[]” communication with class counsel over seven years).

*9 Norton points to class settlements in wage-and-hour cases in which the courts, including this court, awarded \$7,500 service awards. *See, e.g., Cruz v. Sky Chefs, Inc.*, No. C-12-02507-DMR, 2014 WL 7247065, at *6 (N.D. Cal. Dec. 19, 2014) (\$7,000 award); *Jacobs v. Cal. State Auto. Ass’n Inter-Ins. Bureau*, No. C07-00362-MHP, 2009 WL 3562871, at *5 (N.D. Cal. Oct. 27, 2009) (\$7,500 award). In employment cases, plaintiffs often “undertake a significant reputational risk by bringing suit against their former employers.” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 287 (N.D. Cal. 2015). Norton does not establish that she suffered any financial or reputational harm or retaliation for serving as class representative. *Compare, e.g., McLeod v. Bank of Am., N.A.*, 2019 WL 1170487, at *9 (\$15,000 service award reasonable where plaintiff believed that the defendant “terminated her employment in part due to her prosecution of the subject lawsuit”); *Bellinghausen*, 306 F.R.D. at 287 (awarding \$15,000 where plaintiff averred he lost job opportunities and feared future reputational harm); *Cruz v. Sky Chefs*, 2014 WL 7247065, at *6 (awarding \$7,000 where plaintiff undertook a “financial risk” with the case).

Norton also points out that she is not eligible for any portion of the \$50,000 fund reserved for subclass members, even though she is a member of the subclass. Approval Mot. at 15; *see* Agreement § 6.02 (“Under no circumstances, however, may Plaintiff receive any of the \$50,000 that is to be distributed to Subclass Members.”). At the hearing, Kennedy argued that because of her role as a class representative, she is foregoing her claim to a statutory award of civil penalties. However, under 15 U.S.C. § 1692k(2) expressly entitles a prevailing named plaintiff to a maximum of \$1,000 in civil penalties and “such amount as the court may allow for all other class members, without regard to a minimum individual recovery.” *See also* Cal. Civ. Code § 1788.30(b) (authorizing statutory damages for an individual up to \$1,000). Norton therefore is entitled to only up to \$2,000 by law; she did not waive her right to an additional payment because she assumed the role of class representation. The court is thus persuaded that Norton’s eligibility for FDCPA-related claims does not justify an exceptional service award. *See also Harper v. L. Off. of Harris & Zide LLP*, No. 15-CV-01114-HSG, 2017 WL 995215, at *6 (N.D. Cal. Mar. 15, 2017) (FCDPA case in which named plaintiffs did not even seek service awards because the defendants agreed to pay \$1,000 as statutory damages); *Schuchardt*, 314 F.R.D. at 691 (same).

The court values and recognizes Norton’s service on behalf of the class resulting in an important settlement for judgment debtor. Nevertheless, her work does not justify deviation from the Ninth Circuit’s presumptively reasonable standard of \$5,000. Accordingly, the court awards a \$5,000 service payment to Norton, to be issued in accordance with the procedures set forth in section 6.01 of the Agreement.

* * *

Considering the above factors and the factors evaluated in the Preliminary Approval Order, the court finds that the Agreement is fair, adequate, and reasonable, and that the class members received adequate notice. Accordingly, the court grants Norton’s motion for final approval of the class action settlement.

IV. MOTION FOR ATTORNEYS’ FEES

Next, the court addresses Norton’s unopposed motion for attorneys’ fees. Class counsel seek an award of \$239,373.00 in attorney’s fees and \$2,053.58 in costs. The Agreement provided for an award “not to exceed \$241,426.58,” which is the total sum that class counsel requests here. Agreement § 7.01. Defendants agreed that they would not oppose a request for fees as long as the request did not exceed that amount. *Id.* The court evaluated this request at the preliminary approval stage and ruled that class counsel’s requested rates “appear to be within a reasonable range” and their hours billed “are not clearly unreasonable.” Prelim. Approval Order at 21. Nonetheless, the court deferred ruling on the specific amount of attorneys’ fees and costs until the final fairness hearing. *Id.*

*10 “In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Also, “[i]n order to encourage private enforcement of the law ... Congress has legislated that in certain cases prevailing parties may recover their attorneys’ fees from the opposing side.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)). The FDCPA is such a statute, as it authorizes that “any debt collector who fails to comply with its provisions is liable ‘in the case of any successful action ... [for] the costs of the action, together with a reasonable attorney’s fee as determined by the court.’ ” *Id.* (quoting 15 U.S.C. § 1692k(a)(3)) (alterations in original). “The FDCPA’s statutory language makes an award of fees mandatory.” *Id.*

Even where, as here, the parties' agreement provides for attorneys' fees, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *Bluetooth*, 654 F.3d at 941. The "lodestar method" is appropriate in class actions brought under fee-shifting statutes." *Camacho*, 523 F.3d at 978 (9th Cir. 2008); see *Harper*, 2017 WL 995215, at *6 (N.D. Cal. Mar. 15, 2017) (calculating attorneys' fees in a FDCPA and Rosenthal Act class settlement using the lodestar method); *Schuchardt*, 314 F.R.D. at 688 (same). The court previously ruled that the lodestar method is appropriate here. Prelim. Approval Order at 20.⁹

"The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Bluetooth*, 654 F.3d at 941. "Though the lodestar figure is presumptively reasonable, the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of "reasonableness" factors." *Id.* at 941-42 (internal citations and quotations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.*

A. Reasonable Hours

First, the court "must determine a reasonable number of hours for which the prevailing party should be compensated." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). "The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The party seeking the fee award bears the "the burden of submitting billing records to establish that the number of hours it has requested are reasonable." *Gonzalez*, 729 F.3d at 1202.

Class counsel testifies that it billed 541.77 hours on this matter, divided between 438.7 hours by attorney William E. Kennedy and 103.07 hours by three attorneys at HERA. Fees Mot. at 9; Declaration of William E. Kennedy ("Kennedy Fees Decl.") ¶ 5; Declaration of Gina Di Giusto ("Di Giusto Decl.") ¶ 22 [Docket Nos. 139, 140.] Class counsel categorized their hours spent on different stages of the case ranging from conducting the initial investigation to preparing this fees motion. Kennedy Fees Decl. ¶ 5; Di Giusto Decl. ¶

22. They do not seek reimbursement of certain administrative costs. Kennedy Fees Decl. ¶ 3; Di Giusto Decl. ¶¶ 21, 24.

*11 Class counsel's chronological summary of their work is sufficient to evaluate their hours worked. See *Schuchardt*, 314 F.R.D. at 690. ("The Court may rely on summaries of hours worked, and contemporaneous billing records are unnecessary."). As the court previously observed, while class counsel billed a large number of hours, this case has involved extensive litigation, including two motions to dismiss, Defendants' motion to amend its answer, class certification (and opposing Defendants' subsequent petition to appeal the class certification order), Norton's deposition, two mediation sessions, and multiple rounds of settlement negotiations and motions for preliminary approval. Although class counsel did not provide discrete time records, there is no indication that any of the hours billed on each category of work is redundant, duplicative, or excessive. See *Gonzalez*, 729 F.3d at 1203. HERA's attorneys further testified that they removed any duplicate entries. Di Giusto Decl. ¶ 24. Accordingly, the court finds that class counsel's hours billed are reasonable.

B. Reasonable Rate

Next, the court "must determine a reasonable hourly rate to use for attorneys and paralegals in computing the lodestar amount." *Gonzalez*, 729 F.3d at 1205. "Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits." *Camacho*, 523 F.3d at 979. The court must rely on the prevailing rate in the community "for similar work performed by attorneys of comparable skill, experience, and reputation." *Id.* (quoting *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997)). The fee applicants must testify that "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). Their "affidavits ... and rate determinations in other cases are satisfactory evidence of the prevailing market rate." *Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)).

Kennedy requests a \$600 hourly billing rate. Kennedy Fees Decl. ¶ 6. He has over twenty-nine years of relevant experience and has practiced law since 1990. *Id.* ¶ 11. Virtually all of his cases involved consumer protection laws, including debt collection matters. *Id.* ¶ 11. Kennedy has served as co-counsel in at least ten certified class actions, four putative class actions that reached settlements, and many

other cases resulting in published decisions in state or federal court. *Id.* ¶¶ 11-14.

Kennedy does not provide an estimate of the reasonable prevailing hourly rate for attorneys of his experience level in the San Francisco Bay Area. However, his rate falls well within the prevailing hourly rates for civil rights attorneys here. *Gonzales v. City of San Jose*, No. 13-CV-00695-BLF, 2016 WL 3011791, *4 (N.D. Cal. May 26, 2016) (surveying cases). At least one court has previously confirmed a \$600 hourly rate in a FDCPA case for an attorney commensurate with Kennedy's experience and subject-matter expertise. *See, e.g., Price-Pauline v. Performant Recovery, Inc.*, No. 14-cv-850-JD, 2016 WL 310268, at *2 (N.D. Cal. Jan. 26, 2016). Also, over four years ago, another court in this district approved a fee award for Kennedy at a \$550 hourly rate. *Castillo v. Nationstar Mortg. LLC*, No. 15-CV-01743-BLF, 2017 WL 6513653, at *4 (N.D. Cal. Dec. 20, 2017). State courts in Santa Clara County and Napa County previously approved a \$475 hourly rate for Kennedy in 2012 and 2013. *See* Kennedy Fees Decl. Ex. 3-4. In light of these decisions rendered over several years ago and the length of this lawsuit, a normal adjustment of rates to reflect their present value is warranted. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) (“District courts have the discretion to compensate plaintiff’s attorneys for a delay in payment by ... using the attorneys’ historical rates and adding a prime rate enhancement.”). The court therefore finds that Kennedy's billing rate is reasonable.

*12 HERA's attorneys also request a billing rate of \$400 for Gina Di Giusto, \$475 for Noah Zinner, and \$400 for Natalie Lyons. Di Giusto Decl. ¶¶ 9, 16, 21. Di Giusto has practiced law since 2013 and has substantial experience litigating consumer protection cases in federal and state court. *Id.* ¶ 5, 8. Zinner has practiced since 2006 and also has substantial experience in consumer protections, including serving as primary counsel in an important decision on fair debt collection on mortgage loans. *Id.* ¶¶ 13-14. Lyons has practiced since 2013 and has litigated several class actions. *Id.* ¶¶ 19-20. Another court in this district previously awarded attorneys’ fees to Di Giusto and Zinner based on rates of \$350 and \$475, respectively, in a FDCPA class action. *Hanson v. JQD, LLC*, No. 13-cv-5377-RS, slip op. at 1 (N.D. Cal. April 27, 2017) (ECF No. 92); *see id.* (ECF No. 83-2) (declaration setting forth Zinner's and Di Giusto's billing rates). HERA's attorneys’ billing rates are in line with the prevailing rates for attorneys in this community of their experience and subject-

matter expertise. The court therefore finds that the rates for Di Giusto, Zinner, and Lyons are reasonable.

C. Lodestar Calculation

Based on the billing hours and rates provided above, class counsel—and, independently, the court—calculates its lodestar amount as \$305,595.50. *See* Kennedy Fees Decl. ¶ 5; Di Giusto Decl. ¶¶ 22, 25. “After determining the lodestar, the Court divides the total fees sought by the lodestar to arrive at the multiplier.” *Schuchardt*, 314 F.R.D. at 690. Because the total fees requested are less than the lodestar, the calculation results in a negative multiplier, meaning that class counsel reduced their fees. “[C]ourts view self-reduced fees favorably.” *Id.* (citing cases). The negative multiplier “strongly suggests the reasonableness of [a] negotiated fee” in this case. *Rosado v. Ebay Inc.*, Case No. 12-cv-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016).

For the foregoing reasons, the court finds that class counsel's request for attorneys’ fees is reasonable.

D. Costs

The FDCPA and the Rosenthal Act authorize an award of costs. 15 U.S.C. § 1692k(a)(2)(3); Cal. Civ. Code § 1788.30(c). Class counsel requests an award of \$2,053.58 in costs and expenses. Kennedy Fees Decl. ¶ 10. These costs included filing, service of process, discovery, and court records fees. *Id.* The court finds that these costs are reasonable. The motion for attorneys’ fees is therefore granted.

VI. CONCLUSION

For the reasons set forth above, the court grants Norton's motion for final approval and motion for attorneys’ fees and costs. Class counsel is awarded **\$239,373** in fees and **\$2,053.58** in costs. Norton is awarded **\$5,000** as an incentive award.

Within **21 days** after the final distribution of settlement funds (including to the cy pres recipient) and payment of attorneys’ fees, class counsel shall file a **Post-Distribution Accounting** in accordance with the Procedural Guidance for Class Action Settlements, *available at* <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements>. The Post-Distribution Accounting must contain all information listed in the Guidance, and shall be filed with the court and posted on the Settlement Website.

All Citations

IT IS SO ORDERED.

Slip Copy, 2022 WL 562831

Footnotes

- 1 A more complete procedural history of this matter may be found in the court's preliminary approval order. Prelim. Approval Order at 3-4.
- 2 The Agreement is attached as Exhibit 1 to the Declaration of William E. Kennedy in support of Norton's motion for final approval ("Kennedy Decl."). [Docket No. 143-1.] At the hearing, class counsel indicated that given the number of valid claims processed, each sub-class member will likely receive about \$2,000 each.
- 3 Available at <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.
- 4 See also Procedural Guidance, "Final Approval" (establishing guidelines on class members' response, attorneys' fees, and incentive awards).
- 5 The Agreement provides that "[i]n the event that Class Counsel or Defendants' Counsel disagree with the decision of the Class Administrator to accept or reject a Claim Form, Counsel shall meet and confer in good faith to attempt to reach a resolution. In the event that Counsel reach an agreement as to how to treat the disputed Claim Form, the Class Administrator must comply with that agreement, as long as it is consistent with terms of this Agreement. In the event that Counsel cannot reach an agreement as to how to treat the disputed Claim Form, they will jointly raise the issue with the Court in the motion for Final Approval of the Settlement." Agreement § 5.08.
- 6 The Tran Declaration and Supplemental Tran Declaration refer to this class member as Rosa Vazquez. In light of how the class member identifies herself in her declaration, the court refers to her as Rosa Castaneda.
- 7 Kennedy also objected that the parties failed to sufficiently meet and confer about Castaneda's claim before Defendants challenged it. On December 21, he sent an email to defense counsel explaining that he disagreed with CPT's decision that Castaneda's claim was invalid. Kennedy Suppl. Decl. Ex. 1. He explained that Castaneda "submitted a timely Claim Form, accurately checked the 'Yes' box, and accurately wrote and signed her true name, address, and last four digits of her social security number," thereby satisfying the claim requirements. Id. Defense counsel replied the next day that they would "look at this and circle back." Id. Kennedy represents that "at no time has Defendants' counsel contacted [him] to meet and confer" and only responded by adding a footnote to the motion indicating they did not concede the validity of her claim. Kennedy Suppl. Decl. ¶ 7.
- 8 Norton initially advised the court of a likely dispute over the timeliness of Della Porta's claim in her reply brief filed the day before the fairness hearing. See Reply at 4. At that time, CPT had not made a determination about the claim. At the hearing, the court ordered CPT to issue its ruling by the following day and for any challenges to be filed within one week.
- 9 Plaintiffs seek attorneys' fees apart from the class members' recovery. See Agreement § 7.01. Although the statutory fee award and forgiveness of court costs is not distributed on a claims-made basis, the lodestar method is nevertheless appropriate since most of the monetary relief is based on the number of claims submitted. The other method of calculating attorneys' fees, as a percentage of recovery from the common fund, is inappropriate here. See also [Schuchardt](#), 314 F.R.D. at 688.

EXHIBIT 2

2017 WL 6513653

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

Jennifer CASTILLO, et al., Plaintiffs,

v.

NATIONSTAR MORTGAGE

LLC, et al., Defendants.

Case No. 15-cv-01743-BLF

|

Signed 12/20/2017

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

[Re: ECF 118]

[BETH LABSON FREEMAN](#), United States District Judge

*1 Plaintiffs Jennifer and Jason Castillo filed this suit in the Santa Clara County Superior Court in March 2015, seeking to prevent foreclosure on their home and to recover damages for the alleged mishandling of their home mortgage loan. Defendants are Nationstar Mortgage, LLC, the loan servicer, and Wells Fargo Bank, N.A., the trustee for the securitized trust which allegedly owned the mortgage and note at issue. Following removal of the action to federal district court and a year and a half of contentious litigation, the parties reached settlement. The Castillos now seek statutory attorneys' fees

and costs.¹ Their motion is GRANTED IN PART AND DENIED IN PART for the reasons discussed below.

I. BACKGROUND

In 2009, the Castillos submitted an application for a modification of their home mortgage loan to Bank of America, which was the loan servicer at the time. A dispute arose regarding the modification process, which the Castillos and Bank of America settled. Letcher Decl. ¶ 5, ECF 123. As part of the settlement, Bank of America agreed to the loan modification. *Id.* However, before the loan modification was finalized, Bank of America transferred the loan to Nationstar. *Id.* Nationstar, the new loan servicer, agreed to honor the loan modification. *Id.* The Castillos submitted monthly payments under the terms of the loan as modified. *Id.* ¶ 6.

Nationstar's Errors

Nationstar erred in its implementation of the loan modification. Letcher Decl. ¶ 6, ECF 123. In 2014, it improperly charged the Castillos thousands of dollars in escrow and legal fees, raised the Castillos' monthly mortgage payment from approximately \$3,000 per month to approximately \$5,000 per month, rejected the Castillos' loan payments, and asserted that the Castillos were in default. *Id.* The Castillos, through counsel, attempted to resolve the issue over the next 9 months, but they were unsuccessful. *Id.* ¶ 7. In January 2015, Nationstar claimed that the Castillos were \$41,000 overdue on their mortgage. *Id.* In February 2015, Nationstar acknowledged its errors in a letter to the Castillos' counsel. *Id.* ¶ 8. Nationstar nonetheless failed to correct the Castillos' account, continued to overbill them, and instituted foreclosure proceedings. *Id.*

This Lawsuit and Defendants' Motion to Dismiss

The Castillos filed this lawsuit in state court on March 19, 2015, asserting state common law claims for breach of contract and negligence; violations of state statutes, including the Homeowner Bill of Rights, the Rosenthal Fair Debt Collection Practices Act, the Consumer Credit Reporting Act, and the Unfair Competition Law; and violations of federal statutes, including the Real Estate Settlement Procedures Act and Fair Credit Reporting Act. Compl., Exh. A to Notice of Removal, ECF 1. Shortly thereafter, Defendants removed the action to federal district court and filed a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), asserting that the complaint should be dismissed with prejudice for failure to state a claim. Defs.' MTD, ECF 16. The Castillos

amended their pleading in response to the motion, filing a first amended complaint (“FAC”) which omitted the claim under the Homeowner Bill of Rights and added factual allegations to support the other claims. FAC, ECF 18. Defendants answered the FAC on June 15, 2015. Answer, ECF 19. While Defendants admitted the key factual allegations of the FAC, they asserted twelve affirmative defenses and requested that the Castillos take nothing by their suit and that Defendants be awarded costs and attorneys’ fees. *Id.*

Discovery

*2 The Castillos spent the next year and a half pursuing discovery, attempting among other things to obtain basic information such as what Defendants claimed that they owed and how Defendants had calculated those amounts. Letcher Decl. ¶¶ 18-30, ECF 123. Nationstar claimed that documents did not exist but then later produced them. *Id.* ¶¶ 34-39. Nationstar also repeatedly reapplied payments on the Castillos’ mortgage without explaining to them what it was doing. *Id.* ¶ 16. The Castillos sent Nationstar five notices of error between May 2015 and May 2016, most of which Nationstar ignored. *Id.* ¶ 17. The Castillos ultimately propounded five sets of discovery requests, and the parties submitted four joint discovery letters to Magistrate Judge Cousins. *Id.* ¶¶ 44-46. Judge Cousins’ rulings on the discovery disputes were split, with some issues being resolved in the Castillos’ favor and others in Defendants’ favor. *See* Judge Cousins’ Orders, ECF 40, 58, 73. The parties also took depositions. Letcher Decl. ¶¶ 49-53, ECF 123.

Second Amended Complaint

In April 2016, the Castillos sought leave to file a second amended complaint (“SAC”), seeking among other things to add additional facts and claims based on information learned in discovery. *See* Pls.’ Motion to Amend, ECF 45. Defendants opposed the motion. *See* Defs.’ Opposition, ECF 48. Following completion of briefing on the motion, and after hearing oral argument, the Court granted the Castillos leave to amend. *See* Order Granting Plaintiffs’ Motion to Amend Complaint, ECF 60. The Castillos filed their SAC on August 12, 2016. *See* SAC, ECF 61.

The Castillos’ Motion for Partial Summary Judgment

The Castillos moved for partial summary judgment in October 2016, seeking to establish liability under their first and second claims, for breach of contract and violation of the Rosenthal Act respectively, and as to certain defenses.

Motion for Partial Summary Judgment, ECF 76. In November 2016, after completion of the briefing and oral argument, the Court granted partial summary judgment for the Castillos as to liability on the contract and Rosenthal Act claims. Order Granting in Part and Denying in Part Plaintiffs’ Motion for Partial Summary Judgment, ECF 93. The Court denied partial summary judgment as to defenses. *Id.*

Trial Preparation and Settlement

Starting in late November 2016, the Castillos’ counsel began preparing for trial, which was set for February 13, 2017 with pretrial filings due in mid-January 2017. Letcher Decl. ¶ 76, ECF 123. On January 11, 2017, the parties reached settlement after participating in a two-day Magistrate Judge Settlement Conference with Magistrate Judge Cousins. *See* Minute Entries, ECF 100-01. While the settlement agreement required Defendants to pay the Castillos \$250,000 by February 10, 2017, Nationstar demanded that the Castillos first dismiss the action. Letcher Decl. ¶ 79, ECF 123. The dispute necessitated further sessions with Magistrate Judge Cousins. *See* Minutes, ECF 104, 108, 109, 113. On March 3, 2017, the Court approved the parties’ stipulation for dismissal of the action with prejudice. *See* Stipulation and Order, ECF 115. The Court retained jurisdiction to hear a motion for attorneys’ fees and costs. *Id.*

II. DISCUSSION

The statutes under which the Castillos sued Defendants mandate an award of reasonable attorneys’ fees and costs to the prevailing party. *See* Rosenthal Act, Cal. Civ. Code § 1788.30(c) (providing that “the prevailing party shall be entitled to costs of the action” and that “[r]easonable attorney’s fees, which shall be based on time necessarily expended to enforce the liability, shall be awarded to a prevailing debtor”); RESPA, 12 U.S.C. § 2605(f)(3) (providing that “[w]hosoever fails to comply” with the statute “shall be liable to the borrower” for “the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances”); Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.31(d) (providing that prevailing plaintiffs “shall be entitled to recover court costs and reasonable attorney’s fees”); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n(a)(3), 1681o(a)(2) (providing for award of costs and reasonable attorneys’ fees to the prevailing party).

*3 The Castillos obtained partial summary judgment of liability on the Rosenthal Act claim, and the parties settled

the remaining claims. The Court therefore has no difficulty concluding, and Defendants do not dispute, that the Castillos are prevailing parties. The crux of the parties' dispute is whether the attorneys' fees and costs requested by the Castillos are "reasonable."

In their moving papers, the Castillos requests attorneys' fees in the amount of \$790,993.75 and costs in the amount of \$30,978.24. In their reply, the Castillos request an additional \$15,827.50 for preparing the reply. All told, the Castillos request \$806,821.25 in attorneys' fees and \$30,978.24 in costs. *See* Reply at 5 n. 6, ECF 128. Defendants contend that the requested fees are unreasonable, and they ask the Court to award no more than \$374,344.94 in total attorneys' fees and costs combined.

A. Lodestar Method

Courts in the Ninth Circuit determine reasonable attorneys' fees using the lodestar method. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Id.* (internal quotation marks and citation omitted). The party seeking attorneys' fees bears the burden of demonstrating that the rates requested "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 980. Generally, "the relevant community is the forum in which the district court sits." *Id.* at 979. Typically, "affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community and rate determinations in other cases ... are satisfactory evidence of the prevailing market rate." *Id.* at 980 (internal quotation marks, citation, and brackets omitted). "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the ... facts asserted by the prevailing party in its submitted affidavits." *Id.* (internal quotation marks and citation omitted).

"Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." *Camacho*, 523 F.3d at 978 (internal quotation marks and citation omitted). For example, "a district court may reduce attorneys' fees by a percentage, so long as the court sets forth clear and concise reasons for adopting this approach." *Id.* at 982. The Ninth Circuit has recognized that "percentages indeed are

acceptable, and perhaps necessary, tools for district courts fashioning reasonable fee awards." *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992). However, the district court may not impose an arbitrary percentage reductions—the court must offer "some explanation for the precise reduction chosen." *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1151 (9th Cir. 2001).

B. Hourly Rates

Plaintiffs were represented by four attorneys in this matter: (1) William E. Kennedy, Consumer Law Office of William E. Kennedy; (2) Elizabeth S. Letcher, Law Offices of Elizabeth S. Letcher; (3) Robert David Humphreys, Humphreys, Wallace, Humphreys, P.C.; and (4) Lucius James Wallace, Humphreys, Wallace, Humphreys, P.C. Mr. Kennedy and Ms. Letcher represented the Castillos in the earlier lawsuit against Bank of America which gave rise to the loan modification which Nationstar failed to honor. Letcher Decl. ¶¶ 4-5, ECF 123. Mr. Kennedy then represented the Castillos in their pre-suit efforts to resolve Nationstar's mishandling of their mortgage loan. *Id.* ¶¶ 7-10. Ms. Letcher joined Mr. Kennedy as co-counsel when the complaint in this action was being prepared. *Id.* Mr. Kennedy and Ms. Letcher litigated the case until the eve of trial. However, approximately two months before the scheduled trial date of February 13, 2016, trial specialists Mr. Humphreys and Mr. Wallace joined the team. *Id.* ¶ 85.

*4 Mr. Kennedy requests an hourly rate of \$550.00. Kennedy Decl. ¶ 3, ECF 120. He has practiced law for more than 25 years, primarily in the areas of credit reporting, unfair debt collection practices, and other consumer issues. *Id.* ¶ 9. He has extensive experience litigating class action and individual lawsuits in these areas. *Id.* ¶¶ 10-12. In 2012 and 2013 he was awarded an hourly rate of \$475.00 in Napa County Superior Court and Santa Clara County Superior Court. *Id.* ¶ 8.

Ms. Letcher requests an hourly rate of \$525.00. Letcher Decl. ¶ 87, ECF 123. She has more than 20 years of experience in complex federal litigation, and extensive experience in the areas of mortgage servicing and debt collection. *Id.* ¶¶ 87-88. She was awarded an hourly rate of \$500.00 for work done in 2012-2014 in Alameda County, and an hourly rate of \$425.00 for work done in the Eastern District of Missouri in 2015. *Id.* ¶¶ 92-93.

Both Mr. Humphreys and Mr. Wallace, who are law partners at a firm in Oklahoma, request an hourly rate of \$600.00.

Humphreys Decl. ¶ 12, ECF 121; Wallace Decl. ¶ 11, ECF 122. Mr. Humphreys has practiced law for 29 years. Humphreys Decl. ¶ 1. Since 1994, he has focused his practice on consumer protection cases, and he has been recognized nationally as a consumer protection trial lawyer. *Id.* ¶ 2. Mr. Wallace has practiced law for 22 years. Wallace Decl. ¶ 1, ECF 122. He is a nationally recognized trial lawyer, and he has participated in dozens of trials and settlements involving debt collection abuse, identity theft, auto fraud, and mortgage fraud, and wrongful foreclosure. *Id.* ¶ 2.

Courts in this district have found rates in the range of those proposed by the Castillos to be reasonable for highly experienced attorneys. *See, e.g., Gonzales v. City of San Jose*, No. 13-cv-00695-BLF, 2016 WL 3011791, at *4 (N.D. Cal. May 26, 2016) (surveying rates); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 591-92 (N.D. Cal. 2015) (“In the Bay Area, reasonable hourly rates for partners range from \$560 to \$800, for associates from \$285 to \$510, and for paralegals and litigation support staff from \$150 to \$240.”); *Martell v. Baker*, No. 14-cv-04723-BLF, 2015 WL 3920056, at *2 (N.D. Cal. June 25, 2015) (approving \$500 rate for a San Jose consumer credit attorney with 17 years' experience). Moreover, the Castillos submit the declaration of an experienced consumer rights advocate, Mark A. Chavez, who supports their rate requests. Chavez Decl., ECF 119. The requested rates are consistent with the 2015-2018 Laffey Matrix rates for attorneys with the same level of experience. *See* <https://www.justice.gov/usao-dc/file/796471/download> (accessed December 15, 2017).

Defendants do not mount any serious challenge to the requested rates. They address the reasonableness of counsel's rates only in a footnote, in which they assert that the requested rates are unreasonable because the same attorneys charged lower rates 18 months ago in connection with another case, *May v. Nationstar Mortgage, LLC*, No. 4:14cv0578 TCM, 2015 WL 9185408 (E.D. Mo. Dec. 17, 2015). Defendants fail to mention that *May* was litigated in the Eastern District of Missouri, and they offer no evidence that the hourly rates prevailing in Missouri are comparable to the hourly rates in the Bay Area.

The Court concludes that the Castillos have established that the hourly rates requested by their attorneys are reasonable, and that Defendants have failed to present evidence showing that the rates are unreasonable.

C. Hours Expended

While each of the Castillos' attorneys describe their work on the case in their own declarations, Mr. Kennedy's declaration includes a chart summarizing work done per task. That chart is reproduced below for the sake of convenience, modified so that the tasks are numbered.

	E. Letcher		W. Kennedy		Humphreys/ Wallace		Total	
	Hrs.	\$	Hrs.	\$	Hrs.	\$	Hrs.	\$
(1) Dispute/ Complaint	6.7	3,412.50	44.9	24,365	0	0	51.6	27,777.50
(2) Motion to Dismiss and First Am. Complaint	18.9	9,266.25	6.7	2,942.50	0	0	25.6	12,208.75
(3) Discovery	342.0	172,620	301.3	150,810	0	0	643.3	323,430.00
(4) Accounting	39.9	19,766.25	14.5	5,967.50	0	0	54.4	25,733.75
(5) Miscell.	47.8	20,790.00	57.1	28,022.50	0	0	104.9	48,812.50
(6) Second Amended Complaint and Motion	34.8	17,062.50	17.8	9,597.50	0	0	52.6	26,660.00
(7) Summary Adjudicatio n Motion/ Hardship Defense	145.0	74,655.00	74.6	40,122.50	0	0	219.6	114,777.50
(8) Trial Preparation	84.3	41,580.00	53.1	26,620	52.4	30,060	189.8	98,260.00
(9) Settlement/ Mediation	35.3	16,012.50	40.6	22,000	27.5	15,810	103.4	53,822.50
(10) Post- Settlement Disputes	0	0	38.3	20,817.5	4.4	1,890	42.7	22,707.50
(11) Fee Med/ Fee Motion	30.4	15,776.25	34.2	18,177.50	5.3	2,850	69.9	36,803.75
Totals	785.1	390,941.25	683.1	349,442.50	89.6	50,610	1557.8	790,993.75

The Court separately addresses each of these 11 categories of tasks, below. The chart does not reflect 22.5 hours that Mr. Kennedy spent, and 7.1 hours that Ms. Letcher spent, in preparing the Castillos' reply on the present motion. *See* Kennedy Reply Decl. ¶ 33, ECF 129; Letcher Reply Decl. ¶ 7, ECF 130. The hours spent on the reply are treated as a 12th category of task in the following discussion.

(1) Pre-Suit Dispute and Preparation of Complaint (51.6 Hours)

The Castillos request \$27,777.50 for 51.6 hours spent on pre-suit efforts to resolve the dispute and the preparation of the complaint. Mr. Kennedy spent 25.1 hours on pre-suit legal analysis, research, and sending five RESPA Notices of Error over the course of nine months in an effort to resolve Nationstar's mishandling of the Castillos' mortgage. Letcher Decl. ¶ 10, ECF 123. Mr. Kennedy spent another 19.8 hours preparing the complaint. *Id.* Ms. Letcher was brought into the case once it became apparent that the Castillos would have to file suit. Letcher Decl. ¶ 10, ECF 10. She seeks 6.7 hours for time spent helping to prepare the complaint. *Id.*

Defendants challenge these hours on the basis that it was unreasonable “to have run up 51.6 hours writing five notices of error.” Defs.’ Opposition at 9, ECF 127. Defendants mischaracterize the 51.6 hours, which counsel explains were spent not only on the five RESPA Notices of Error, but on legal research and analysis and preparation of the complaint.

*5 The Court concludes that 51.6 hours were reasonably incurred in attempting to resolve Nationstar’s errors over the course of nine months and in preparing the complaint. Accordingly, the Court will award the Castillos attorneys’ fees in the amount of \$27,777.50 for this category.

(2) Motion to Dismiss and First Amended Complaint (25.6 Hours)

The Castillos seek \$12,208.75 for 25.6 hours spent amending the complaint in response to Defendants’ motion to dismiss. Ms. Letcher spent 18.9 hours, and Mr. Kennedy spent 6.7 hours, on this task. Letcher Decl. ¶ 13, ECF 123. Defendants argue that hours claimed for this task are excessive, asserting that if the motion to dismiss was as meritless as the Castillos contend, it should have taken their lawyers “little time” to file an amended pleading. Defs.’ Opposition at 10, ECF 127. Defendants’ argument is not persuasive given that their motion to dismiss separately attacked each of the eight claims asserted in the complaint, requesting dismissal of those claims without leave to amend and dismissal of the action with prejudice. *See* Defs.’ Motion to Dismiss, ECF 16.

*6 The Court finds that 25.6 hours reasonably were incurred in evaluating Defendants’ motion to dismiss and amending the Castillos’ complaint to address the asserted deficiencies. The Court will award the Castillos attorneys’ fees in the amount of \$12,208.75 for this category.

(3) Discovery (643.3 Hours)

The Castillos ask for \$323,430.00 for 643.3 hours devoted to discovery. The discovery was conducted by two senior attorneys, with Ms. Letcher spending 342 hours and Mr. Kennedy spending 301.3 hours, on this category of tasks. Letcher Decl. ¶ 56, ECF 123. A review of the record reveals that discovery was extensive and sprawling. The Castillos propounded five sets of discovery, containing several dozen document requests, interrogatories, and requests for admission (“RFAs”). Letcher Decl. ¶ 46, ECF 123; Pierce Decl. ¶¶ 24. In response, Defendants produced 6,571 pages.² Letcher Decl. ¶ 32. The Castillos also deposed 7 of Defendants’ employees over 10 days and across 5 states.

Pierce Decl. ¶ 25. When all was said and done, the Castillos provided court-ordered declarations estimating their actual damages to be \$100 each and their emotional distress damages to be \$500,000 each. Jason Castillo Damages Decl., Exh. M-2 to Abbott Decl., ECF 127-3; Jennifer Castillo Damages Decl., Exh. M-3 to Abbott Decl., ECF 127-3. The case settled for \$250,000. Letcher Decl. ¶¶ 77-79, ECF 123.

Defendants ask the Court to reduce the attorneys’ fees requested for this category by 75%, claiming that discovery was excessive given that Nationstar admitted fault early in the case and the Castillos’ combined actual damages were only \$200. *See* Pierce Decl. ¶¶ 42, 53-56. Defendants also assert duplication of effort by the Castillos’ attorneys and note that Defendants’ attorneys billed far fewer hours for similar tasks. *See id.* ¶¶ 40, 57-62. The Castillos state that they already have shaved off hours that were duplicative, for example by eliminating hours for a second attorney’s attendance at all depositions other than the Rule 30(b)(6) deposition of A.J. Loll. Letcher Decl. ¶ 86, ECF 123. The Castillos’ attorneys also cut their hours to avoid compensation for duplicate efforts—Ms. Letcher cut her time by more than 100 hours while Mr. Kennedy cut his by 50 hours. Letcher Decl. ¶ 86, ECF 123; Kennedy Decl. ¶ 4, ECF 120. Finally, the Castillos contend that although Nationstar admitted to accounting mistakes early in the litigation, it never conceded liability, and the discovery in question was made necessary by Defendants’ own conduct throughout the litigation.

While the Castillos’ arguments are well-taken to some degree, the Court concludes that, overall, discovery did exceed reasonable limits. Noting the skill and experience that Mr. Kennedy and Ms. Letcher brought to this case, the Court would have expected a far greater economy of effort to be evident. Although the Court is not in a position to determine that any specific deposition or discovery request was unnecessary, it seems clear that there was insufficient effort devoted to an overall strategy for discovery and a recalibration of effort as discovery responses were received. For example, the Court would have expected that given the sheer number of RFAs propounded, Defendants’ responses might have provided a basis for consolidating or even eliminating one or more of the seven depositions of Defendants’ employees. There is no indication that the Castillos’ counsel considered such economies. On this basis a reasonable reduction in fees is called for.

*7 Turning to the question of what would be reasonable, Defendants’ request for a 75% reduction is utterly

unsupported by the evidence or even cogent argument. The Court finds no evidence in the record to support Defendants' accusation that the Castillos' counsel deliberately delayed resolution of this case in order to run up their fees through unnecessary discovery. Defendants' own conduct, including commencing foreclosure proceedings while claiming to have admitted its mistakes, and refusing to give the Castillos a straight answer as to what monies were owed (discussed below), contributed to the need for thorough discovery. While recognizing that need, however, and acknowledging the hours voluntarily cut by the Castillos' counsel, the Court nonetheless concludes that the hours expended on discovery were excessive. The Court therefore reduces the fees in this category by 25%, deducting \$80,557.50 from the requested fees of \$323,430.00.

The Court will award the Castillos \$242,872.50 in reasonable attorneys' fees for this category.

(4) Accounting (54.4 Hours)

The Castillos seek \$25,733.75 for 54.4 hours which their lawyers spent trying to understand Nationstar's shifting accounting over the course of the litigation. Ms. Letcher spent 39.9 hours, and Mr. Kennedy spent 14.5 hours, on this task. Ms. Letcher devotes 18 paragraphs of her declaration to explaining the difficulties caused by Nationstar's refusal to simply provide a clear statement of the amounts it asserted were due on the Castillos' mortgage loan. Letcher Decl. ¶¶ 14-31. The Castillos' counsel believed that understanding Nationstar's accounting errors and forcing it to correct them was critical, since Nationstar held the Castillos in "foreclosure status" during the litigation. *Id.* ¶ 27. Counsel's task was rendered more difficult by Nationstar's practice of "stripping payments" from the Castillos' account and reapplying them without notice or explanation. *Id.* ¶ 16. Nationstar also confused matters by stating amounts due and then changing those statements. *Id.* ¶¶ 18-25.

Defendants argue that the Court should disallow all the hours claimed for this task because "[n]o accounting experts were designated by either side in this case" and the parties' settlement agreement with Bank of America, which resulted in the loan modification, set out the required monthly payments. Defs.' Opposition at 13, ECF 127. Defendants' arguments are without merit. This lawsuit was filed because the Castillos could not get Nationstar to correct its errors for 9 months. The lawsuit itself took more than a year and a half to resolve, and then only with the aid of an experienced magistrate judge.

The Court finds that 54.4 hours reasonably were incurred in trying to pin down Nationstar's accounting. The Court will award the Castillos attorneys' fees in the amount of \$25,733.75 for this category.

(5) Miscellaneous (104.9 Hours)

The Castillos request \$48,812.50 for 104.9 hours incurred in performing miscellaneous tasks during litigation. Mr. Kennedy spent 57.1 hours on such tasks while Ms. Letcher spent 47.8 hours on them. Letcher Decl. ¶ 71, ECF 123. This category covers investigation and development of legal theories, preparing case management statements, client communication, consultation with experts, and preparing administrative motions to seal. *Id.* The claimed hours appear to be reasonable for the catchall tasks which arise in any litigation, and Defendants offer no basis for reducing them.

The Court finds that 104.9 hours reasonably were incurred in performing miscellaneous tasks, and it will award the Castillos attorneys' fees in the amount of \$48,812.50 for this category.

(6) Motion for Leave to Amend and Second Amended Complaint (52.6 Hours)

The Castillos request \$26,660.00 for 52.6 hours spent on their motion for leave to amend their pleading and in preparing the SAC. Mr. Kennedy spent 17.8 hours, and Ms. Letcher spent 34.8 hours, on the motion for leave to amend, related administrative motion practice, and preparing the SAC. Letcher Decl. ¶ 63, ECF 123. The Castillos asked Defendants to stipulate to the filing of the SAC to add facts obtained through discovery, but Defendants refused, necessitating briefing on the motion as well as a hearing. *Id.*; *see also* Minute Entry, ECF 62. The Court granted the motion for leave to amend on August 11, 2016 and the SAC was filed the following day. *See* Minute Entry, ECF 62; SAC, ECF 61. The claimed hours appear to be reasonable and Defendants offer no basis for reducing them.

*8 The Court finds that 52.6 hours reasonably were incurred in seeking to amend and preparing the SAC, and it will award the Castillos attorneys' fees in the amount of \$26,660.00 for this category.

(7) Motion for Partial Summary Judgment and Hardship Defense (219.6 Hours)

The Castillos request \$114,777.50 for 219.6 hours spent on their motion for partial summary judgment and research on Nationstar's "hardship defense," which was addressed in that motion. Ms. Letcher spent 145 hours, and Mr. Kennedy spent 75.6 hours, on these tasks. Letcher Decl. ¶ 69, ECF 123.

Defendants ask the Court to cut all hours related to the "hardship defense," asserting that Defendants never raised that defense. In their motion for partial summary judgment, the Castillos argued that the Court should reject Defendants' theory that the loan modification was unenforceable because the Castillos had no financial hardship in 2013. Pls.' Motion at 8, ECF 76. In opposition to the motion for partial summary judgment, Defendants argued that the hardship defense was a "strawman argument" which Defendants had not raised in their answer. Defs.' Opposition at 7-8, ECF 82.

While Defendants never formally raised a "hardship defense" in their answer, Defendants sought discovery of the Castillos' financial records in September 2016 based on Defendants' contention that lack of financial hardship in 2013 "would lead to a complete defense of this action." *See* Joint Discovery Letter at 1, ECF 70. Having taken that position on September 21, 2016, it is somewhat disingenuous of Defendants to assert that the Castillos had no basis at all for addressing the potential defense when they filed their motion for partial summary judgment less than a month later on October 11, 2016. The Court does agree, however, that a defense which was not formally raised by Defendants did not warrant a substantial amount of research or argument. Moreover, the time spent on the motion for partial summary judgment appears to be excessive given counsel's experience.

For these reasons, the Court will reduce Ms. Letcher's time by 35 hours and Mr. Kennedy's time by 25 hours. Applying counsel's billing rates, those reductions in hours translate to reductions in fees in the amounts of \$18,375 and \$13,750, respectively. The Court therefore finds that the Castillos reasonably incurred attorneys' fees in the amount of \$82,652.50 for this category and it will award the Castillos fees in that amount.

(8) Trial Preparation (189.8 Hours)

The Castillos request \$98,260.00 for 189.8 hours spent on trial preparation. Ms. Letcher spent 84.3 hours, and Mr. Kennedy spent 53.1 hours, on this task. Mr. Humphreys and Mr. Wallace, the attorneys from Oklahoma, spent 52.4 hours on this task. The Court finds that it was unnecessary to have four attorneys billing for trial preparation, particularly when

settlement discussions were underway. While the Castillos of course could not assume that the case would settle, the amount of hours billed by Ms. Letcher and Mr. Kennedy were excessive given that Mr. Humphreys and Mr. Wallace were brought in as trial specialists.

The Court therefore reduces Ms. Letcher's time by 35 hours and Mr. Kennedy's time by 25 hours. Applying counsel's billing rates, those reductions in hours translate to reductions in fees in the amounts of \$18,375 and \$13,750, respectively. The Court therefore finds that the Castillos reasonably incurred attorneys' fees in the amount of \$66,135.00 for this category and it will award the Castillos fees in that amount.

(9) Mediation and Settlement (103.4 Hours)

*9 The Castillos request \$53,822.50 for 103.4 hours spent on mediation and settlement. Ms. Letcher spent 35.3 hours on this category, Mr. Kennedy spent 40.6 hours, and Mr. Humphreys and Mr. Wallace spent 27.5 hours. It is entirely unclear why the trial specialists, Mr. Humphreys and Mr. Wallace, were needed for mediation or settlement discussions. The Court disallows their hours for those tasks entirely.

The Court finds that the 75.9 hours spent on this category by Ms. Letcher and Mr. Kennedy were reasonable. The Court therefore will award the Castillos the attorneys' fees claimed for those hours, totaling \$38,012.50.

(10) Post-Settlement Disputes (42.7 Hours)

The Castillos request \$22,707.50 for 42.7 hours spent resolving post-settlement disputes. Those disputes centered on the drafting of a long-form settlement agreement and negotiating the timing of Defendants' payment of the \$250,000 settlement amount. Letcher Decl. ¶¶ 78-79. Mr. Kennedy spent 38.3 hours on this category, and Mr. Humphreys and Mr. Wallace spent 4.4 hours. It is unclear why the trial specialists, Mr. Humphreys and Mr. Wallace, were needed to resolve the post-settlement disputes. The Court disallows their hours for this category.

The Court finds that the 38.3 hours spent on this category by Mr. Kennedy were reasonable. The Court therefore will award the Castillos the attorneys' fees claimed for those hours, totaling \$20,817.50.

(11) Mediation Re Fees and Filing Fee Motion (69.9 Hours)

The Castillos request \$36,803.75 for 69.9 hours spent working with Magistrate Judge Cousins to resolve their claim for attorneys' fees and filing the present motion. Ms. Letcher spent 30.4 hours on those tasks, Mr. Kennedy spent 34.2 hours, and Mr. Humphreys and Mr. Wallace spent 5.3 hours. The Court finds these hours to be reasonable and will award the Castillos attorneys' fees in the amount of \$36,803.75 for this category.

(12) Reply re Fee Motion (29.6 Hours)

The Castillos request \$15,827.50 for 29.6 hours spent on the reply regarding the present motion. *See* Reply at 5 n.6, ECF

Category of Task	Reasonable Attorneys' Fees Awarded
(1) Dispute/Complaint	\$27,777.50
(2) Motion to Dismiss and First Am. Complaint	\$12,208.75
(3) Discovery	\$242,872.50
(4) Accounting	\$25,733.75
(5) Miscellaneous	\$48,812.50
(6) Second Amended Complaint and Motion	\$26,660.00
(7) Summary Adjudication Motion/Hardship Defense	\$82,652.50
(8) Trial Preparation	\$66,135.00
(9) Settlement/Mediation	\$38,012.50
(10) Post-Settlement Disputes	\$20,817.50
(11) Fee Mediation/Fee Motion	\$36,803.75
(12) Reply	\$15,827.50
Total	\$644,313.75

Defendants argue that the Court should not award attorneys' fees which are disproportionate to the Castillos' recovery of \$250,000. The Supreme Court has held that at least with respect to civil rights litigation, attorneys' fees may not be reduced solely on the basis that they are disproportionate to the plaintiff's recovery. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Courts in this district have been reluctant to reduce fee awards in consumer cases simply because the fee award is larger than the damages recovery.

128. Mr. Kennedy spent 22.5 hours on this task, and Ms. Letcher spent 7.1 hours on this task. Kennedy Reply Decl. ¶¶ 33-34, ECF 129. The Court finds these hours to be reasonable and will award the Castillos \$15,827.50 for this category.³

C. Attorneys' Fees Award

In light of the above discussion, the Court finds that the Castillos are entitled to an attorneys' fee award in the amount of \$644,313.75, calculated as follows:

See, e.g., Garcia v. Resurgent Capital Servs., L.P., No. C-11-1253 EMC, 2012 WL 3778852, at *10 (N.D. Cal. Aug. 30, 2012) (describing the plaintiff's \$50,000 recovery in a Fair Debt Practices Collection Act dispute as an "excellent result," and rejecting the defendants' request to reduce the \$213,606.65 fee award based on "proportionality"). Defendants have not cited any authority for the proposition that the Court should decrease the Castillos' fee award solely because the fees incurred exceed the recovery they obtained through the settlement of the action.

*10 The Court notes that Defendants' comparison of the hours billed by the Castillos' counsel with the hours billed by defense counsel is not particularly helpful. “[O]pposing parties do not always have the same responsibilities under the applicable rules, nor are they necessarily similarly situated with respect to their access to necessary facts, the need to do original legal research to make out their case, and so on.” *Ferland*, 244 F.3d at 1151. “Comparison of the hours spent in particular tasks by the attorney for the party seeking fees and by the attorney for the opposing party, therefore, does not necessarily indicate whether the hours expended by the party seeking fees were excessive.” *Id.* It may be “that the prevailing party’s attorney—who, after all, did prevail—spent more time because she did better work.” *Id.*

Having reviewed the record as a whole, considered the work done by each attorney on each category of task, and reduced the requested fees as appropriate, the Court is satisfied that the attorneys' fees awarded herein are reasonable.

Footnotes

- 1 The Castillos assert that a provision in the note provides an alternate basis for an award of attorneys' fees. See Pls.' Motion at 2 n.1, ECF 118. Because they are entitled to reasonable attorneys' fees and costs under applicable statutes, the Court need not address the Castillos' alternate theory of entitlement to fees under a contractual provision in the note.
- 2 There appears to be a dispute between the parties as to the number of discovery requests propounded by the Castillos and the number of documents produced by Defendants. *Compare* Letcher Decl. ¶¶ 46 & 32 *with* Pierce Decl. ¶¶ 24 & 27. For the sake of simplicity the Court has accepted the Castillos' figures. Whatever the precise numbers of discovery requests and documents produced, it is clear from this record that discovery was extensive.
- 3 The Court notes that Mr. Kennedy appears to have erred in calculating the additional fees for his contribution to the reply brief. He requests \$12,100 for 22.5 hours of work, which at his hourly rate of \$550 would result in fees of \$12,375. The Court awards the \$12,100 which is requested.

D. Costs

Defendants have not disputed the Castillos' claimed costs. The Court therefore will award costs in the amount of \$30,978.24.

III. ORDER

Accordingly, the Castillos' motion for attorneys' fees and costs is GRANTED IN PART AND DENIED IN PART.

The Castillos are HEREBY AWARDED:

- (1) \$644,313.75 in reasonable attorneys' fees; and
- (2) \$30,978.24 in costs.

All Citations

Not Reported in Fed. Supp., 2017 WL 6513653

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Santa Clara, State of California. I am over the age of 18 years and not a party to this action; my business address is 3000 El Camino Real, Suite 4-200, Palo Alto, CA 94306.

On the date written below, I served the following document(s): **DECLARATION OF WILLIAM E. KENNEDY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS**

- (By U.S. Mail)** By placing the document(s) listed above in a sealed envelope with Postage thereon fully prepaid, in the United States Mail in Menlo Park, California, addressed as set forth below.
- (Electronic Service)** By electronically serving a true copy thereof to the e-mail address(es) listed in accordance with Code of Civil Procedure 1010.6(b), California Rules of Court, Rules 2.253(b).
- (File & ServeXpress)** I electronically filed and served the above document(s) utilizing File & ServeXpress on November 7, 2023. Counsel of records are required by the Court to be registered to electronically file and serve on this case and are designated accordingly on the Transaction Receipt located on the File & ServeXpress website.
- (By Personal Service)** By personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct to the best of my knowledge.

Executed on November 7, 2023 at Palo Alto, California.



 Melody L. Sequoia